Public Employment and the Supreme Court's 1976-77 Term

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As public personnel cases were concerned, the Supreme Court was not as prolific in its 1976–77 term as it had been in its 1975–76 term. However, the Court did turn its attention to such significant personnel questions as the nontenured employee's right to a hearing when discharge affects his or her character and reputation, the free-speech rights of public employees, and the rights of public employee unions. Finally, through a series of cases mostly involving the private sector but whose effects clearly reach the public sector, the Court more clearly defined some of the rules applicable in equal employment opportunity cases.

PROCEDURAL RIGHTS OF EMPOLYEES WHO ARE "STIGMATIZED"

In *Wisconsin* v. *Constantineau*,[1] decided in 1971, the Supreme Court decided that "[w]here a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him, notice and opportunity to be heard are essential."[2] The Court's decision was premised on the idea that the Fourteenth Amendment's requirement that states not deprive persons of "liberty" without "due process of law" was implicated because the state's attachment of a "stigma or badge of disgrace" to a person constituted a taking of that person's liberty. *Constantineau* involved a particularly harsh fact pattern—the chief of police of Hartford, Wisconsin, had a notice posted in all retail liquor outlets in the city to the effect that sales or gifts of liquor to Ms. Constantineau were prohibited. Clearly, this widespread publicizing of Ms. Constantineau's alleged drinking problem held her up to public disgrace and could be considered as state action attaching a badge of infamy to her.

A year later, in *Board of Regents* v. *Roth*,[3] a public university professor, whose contract was not renewed, argued that his "liberty" interests under the Fourteenth Amendment had been taken without due process. In denying this claim the Court set out the basic test to be appealed in "stigma" cases:

> The State, in declining to rehire the respondent, did not make any charge against him

that might seriously damage his standing and associations in his community. It did not base the nonrenewal of his contract on a charge, for example, that he had been guilty of dishonesty, or immorality. Had it done so, this would be a different case. For "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." *Wisconsin* v. *Constantineau*, 400 U.S. 433, 437. *Wieman* v. *Updegraff*, 344 U.S. 183, 191; *Joint Anti-Facist Refugee Committee* v. *McGrath*, 341 U.S. 123; *United States* v. *Lovett*, 328 U.S. 303, 316-317; *Peters* v. *Hobby*, 349 U.S. 331, 352 (Douglass J., concurring). See *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 898. In such a case, due process would accord an opportunity to refute the charge before University officials. In the present case, however, there is no suggestion whatever that the respondent's "good name, reputation, honor, or integrity" is at stake.

Similarly, there is no suggestion that the State, in declining to re-employ the respondent, imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities. The State, for example, did not invoke any regulations to bar the respondent from all other public employment in state universities. Had it done so, this, again, would be a different case. For "[t]o be deprived not only of present government employment but of future opportunity for it certainly is no small injury . . ." *Joint Anti-Facist Refugee Committee* v. *McGrath*, *supra*, at 185 (Jackson J., concurring). See *Truax* v. *Raich* 239 U.S. 33, 41. The Court has held, for example, that a State, in regulating eligibility for a type of professional employment, cannot foreclose a range of opportunities" in a manner . . . that contravene[s] . . . Due Process." *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 238 and specifically, in a manner that denies the right to a full prior hearing. *Willner* v. *Committee on Character*, 373 U.S. 96, 103. See *Cafeteria Workers* v. *McElroy*, *supra*, at 898. In the present case, however, this principle does not come into play.[4]

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In a significant footnote the Court made it clear that:

> Mere proof, for example, that his record of nonretention in one job, taken alone, might make him somewhat less attractive to some other employers would hardly establish the kind of foreclosure of opportunities amounting to a deprivation of "liberty."[5]

In 1976, in *Paul* v. *Davis*,[6] the Court sharply diverged from its *Constantineau* ruling, holding that no Fourteenth Amendment liberty interest was involved when the chief of police circulated a flyer to local businesses identifying Davis as an active shoplifter. Nonetheless the Court apparently left *Roth* intact by noting:

> While we have in a number of our prior cases pointed out the frequently drastic effect of the "stigma" which may result from the defamation by the government in a variety of contexts, this line of cases does not establish the proposition that reputation alone, *apart from some more tangible interests such as employment*, is either "liberty" or "property" by itself sufficient to invoke the procedural protection of the Due Process Clause. [Emphasis added.][7]

Finally, in the 1976 case of *Bishop* v. *Wood*,[8] the Court found no "stigma" when a city policeman was fired for "failure to follow certain orders, poor attendance at

police training classes, causing low morale, and conduct unsuited to an officer." The Court did not consider whether these reasons constituted a badge of infamy but rather noted that the reasons for discharge "were communicated orally to the petitioner in private" and that "there is no public disclosure of the reasons for the discharge." It did not matter that the charges were false—"Even so, the reasons stated to him in private had no different impact on his reputation than if they had been true." As noted last year in this journal:

> What the Court leaves unresolved is whether formal written communication of charges, such as those here involved, which finds its way in an official personnel folder, constitutes stigma. The tenor of the court would indicate that such communication would not constitute stigma; still, public employers could appear to avoid this issue by simply noting innocuous grounds as cause for discharge.[9]

In *Codd* v. *Velger*,[10] the Court had a chance to answer this question. An employee had been discharged from employment as a police officer with the City of New York. He later was employed by the Penn-Central Railroad Police Department, where he signed a waiver permitting that employer to look at his city personnel file. Upon reviewing that file, Penn-Central "gleaned that plaintiff had been dismissed because while still a trainee he had put a revolver to his head in an apparent suicide attempt." Based on this information, Penn-Central discharged Velger. The Court, however, avoided answering the critical question because it held that, even were stigmatization involved, "the remedy mandated by the Due Process Clause of the Fourteenth Amendment is 'an opportunity to refute the charge'" and Velger had never alleged that "the report of the apparent suicide attempt was substantially false."

What *Codd* v. *Velger* makes clear is that even if a public employer does stigmatize an employee upon discharge, re-employment is not an appropriate remedy. According to the decision in *Bishop* v. *Wood*, if the employee has no right to employment (*i.e.*, is an untenured employee), discharge for even false reasons does not give rise to a right to employment (*i.e.*, reinstatement). The purpose of the required hearing is *solely* to provide the employee with an opportunity to clear his or her name, not for the purpose of determining whether the discharge was proper.

FREE-SPEECH RIGHTS OF PUBLIC EMPLOYEES

In *Pickering* v. *Board of Education*,[11] the Supreme Court established the basic rule affecting First Amendment rights of public employees. That rule consists of a balancing test wherein the Court balances the interests of the public employee as a citizen, in commenting on matters of public concern, against the interest of the public employer in promoting the efficiency of the public service through its employees. The *Pickering* test has been the established rule in this field since it was first established in 1968 and has been applied in a myriad of circumstances, such as restrictions on public employee political activity rights (*Civil Service Commission* v. *Letter Carriers*),[12] the right of public employees to criticize their superiors (*Arnett* v. *Kennedy*),[13] etc. In *Mount Healthy City Board of Education* v. *Doyle*,[14] the Court applied the *Pickering* test to a public school teacher's statements to a local disc jockey objecting to a newly established dress code for members of the faculty. Under the circumstances, the Supreme Court accepted the District Court's finding that Doyle's statements to the radio station were protected by the First and Fourteenth Amendments. Because the school board had based its decision not to rehire Doyle in substantial part on his constitutionally protected statements to the press, one would have assumed that the Court would have ordered his rehiring. However, the Supreme Court in its decision noted that Doyle had apparently been involved in a number of incidents that could have led the school board to determine not to renew his contract. Furthermore, the Court noted that Doyle lacked tenure (the renewal of his contract would have, because of the number of years involved, given him tenure) and, thus, had no "right" to re-employment. In light of all of the facts, the Court remanded the case to the

District Court in order to give the Board of Education an opportunity to show, by a preponderance of the evidence, that it would have reached the decision not to rehire Doyle even in the absence of the incident involving the radio station.

The *Mount Healthy* case is significant in several respects. First, it reaffirms the rule that public employees retain their First Amendment rights against their public employer but that such rights are limited by the balancing test of *Pickering*. Second, it places on the public employee who claims that his or her discharge was premised upon constitutionally protected activity the burden of showing both that the conduct was constitutionally protected and that such constitutionally protected conduct was a motivating factor in the public employer's decision not to rehire (theoretically the same rule should apply in a discharge case). Third, it establishes that, even if the public employee shows that his/her discharge or nonhiring was based upon such constitutionally protected conduct, the public employer is still granted the right to show that it would have discharged the employee even without considering such conduct. Indeed, no greater burden is placed on the employer in this regard because of its unconstitutional conduct: its otherwise lawful grounds for refusal to hire or to fire need simply be established by a preponderance of the evidence.

Mount Healthy, while it is a free-speech case, has impact in areas other than free speech. For example, there is no reason why it should not apply to other constitutionally protected activities (*i.e.*, the exercise by employees of Fourth Amendment, or search-and-seizure, and Fifth Amendment, or self-incrimination rights). But *Mount Healthy* may have other, more far-reaching effects because of the Court's rationale. It is clear that the Court enunciated a rule under which the employee was to be:

> . . . placed in no worse a position than if he had not engaged in the conduct. A border or marginal candidate should not have the employment question resolved against him because of constitutionally protected conduct. But that same candidate ought not be able, by engaging in such conduct, to prevent his employer from assessing his employment record and reaching a decision not to rehire on the basis of that record simply because the protected conduct makes the employer more certain of the correctness of its decision.

If the objective is to place the employee in no worse a position than the employee would otherwise have occupied and if the employee would have been discharged for other conduct as well, does this not then indicate that in stigma cases, where all that is at stake is the employee's reputation, all that an employee can ask for is a return of his or her good name—not a return of his or her position? It is clear that *Mount Healthy* and *Codd* v. *Velger*, are of a piece. The Supreme Court is making it clear that public employees are not entitled to reinstatement simply because their employer has engaged in some conduct that adversely affects them. Public employees are only entitled to reinstatement when they had a right to the job (tenure) that was wrongfully taken from them or when the only viable reason for discharge was, in fact, a violation of the employee's constitutional rights. Employees get no bonus and employers bear no greater burden of proof simply because the public employer has engaged in conduct that is constitutionally suspect.

RIGHTS OF PUBLIC EMPLOYEE UNIONS

The 1976–77 term of the Supreme Court had before it two cases involving the rights of public employee unions vis-à-vis individual public employees. The results of the cases were mixed—the unions having gained some greater rights in some respects and having lost out in others.

In *City of Madison Joint School District* v. *Wisconsin Employment Relation Commission*,[15] the union had entered into a collective bargaining agreement with the board of education. In 1971 that agreement was up for renegotiation; and the union sought to obtain, in effect, an agency-shop clause that would require all teachers, whether or not members of the union, to pay dues or fees to the union to defray the costs of collective bargaining. The union also sought a provision for binding arbitration of teacher dismissal. Some teachers who were members of the union opposed

the agency-shop provision; and, at a public meeting of the school board, one of these teachers presented a statement in which he informed the board that he had conducted a survey of teachers in 31 schools and that 53 percent of the teachers in those schools opposed the agency-shop provision. Thereafter, the board rejected the agency shop, and a collective bargaining agreement was entered into that did not contain such a provision.

The union involved filed a complaint charging that the board had committed an unfair labor practice because it had, in effect, negotiated with others, rather than negotiating solely with the union that had exclusive bargaining rights. The Supreme Court rejected this position. In the Court's view, the union-member teacher who had addressed the board had simply exercised his First Amendment rights as a citizen to comment on matters of public interest.

> Where the State has opened a forum for direct citizen involvement, it is difficult to find justification for excluding teachers who make up the overwhelming proportion of school employees and are most vitally concerned with the proceedings.

In effect, the Court found that any other decision would allow one party to a controversy—namely, the union—to participate in a public discussion of public business while prohibiting another party—the citizen teacher—from exercising his or her First Amendment right to free speech.

> Whatever its duties as an employer, when the board sits in public meetings to conduct business and hear the views of citizens, it may not be required to discriminate between speakers on the basis of their employment, or the content of their speech.

City of Madison reaffirms the *Pickering* principle and carries that principle one step further. Not only is a public employee protected in his or her free-speech rights (when the balance as set by *Pickering* is in the employee's favor) but if the public employer holds public meetings it is required to permit its public employees to speak at such meetings just as any other citizens. Exclusive bargaining rights of a public employee union cannot impinge upon individual union-member employee citizens' rights to free speech.

In *City of Madison* none of the parties challenged the constitutionality of an agency shop agreement in public employment. However, that challenge was made and rejected in *Abood* v. *Detroit Board of Education.*[16] *Abood* is significant in several respects. First, the Court held that an agency-shop agreement was not an unconstitutional conditioning of public employment. Second, it held that public employee unions were prohibited from utilizing fees obtained from nonmembers as a consequence of the agency-shop agreement "for the expression of political views on behalf of political candidates, or towards the advancement of other idealogical causes not germane to its duties as collective bargaining representative." *Abood* does not decide that public employee unions have a constitutional right to agency-shop agreements; that issue is left to state law and the bargaining strength of the parties. If state law permits an agency shop, the parties may lawfully negotiate an agency shop; and public employees who are not members of the union must then contribute for payment of collective bargaining activities. However, the Court leaves unanswered the question of where to draw the line between collective bargaining activities—which may be paid for by nonmember contributions—and "unrelated" idealogical activity—for which compulsion of fees is prohibited. Certain activity clearly falls within the permitted category—the payment of negotiators' fees, the payment of normal union expenses connected with the bargaining process, the handling of grievances and arbitration, etc. Certain activity clearly falls outside the normal collective bargaining process—the support of legislation affecting abortion, or other general sociological issues. However, the Court itself creates substantial question as to where the line should be drawn in the gray area:

> The process of establishing a written collective bargaining agreement prescribing the terms and conditions of public employment may require not merely concord at the bargaining table but subsequent approval by other public authorities; related budgetary and appropriations decisions might be seen as an integral part of the bargaining process.

Does this mean that support of a political candidate who, for example, chairs the budgetary or appropriations committee dealing with the public employer's budget may be considered as a part of the collective bargaining process and that, if otherwise permitted by law, agency-shop fees may be utilized to help elect such person? If the answer to this question is yes, where does one draw the line between a candidate who chairs a committee, members of the committee, and members of the legislature in general? What if last year's budget containing a negotiated pay increase failed of passage by only one vote?

EQUAL EMPLOYMENT OPPORTUNITY

The Supreme Court decided two equal employment opportunity cases directly involving public employers; however, a number of the Court's decisions concerning the private sector have equal application to the public employment sector.

In *Hazelwood School District* v. *United States*,[17] a public employer was charged with a pattern or practice of employment discrimination in violation of Title VII of the 1972 Civil Rights Act. The issue before the Court was not limited solely to pattern-and-practice cases but, rather, concerned itself with the appropriate use of statistics—an issue affecting EEO cases in general. Most equal employment opportunity cases which proceed on a class basis involve the use of statistics. In *Hazelwood* the plaintiff pointed to the low percentage of black teachers in the *Hazelwood* school system and argued that, when compared with the number of black teachers available in the Hazelwood area, this low percentage showed that the school district was discriminating. The public employer argued that the appropriate comparison was between the number of minority teachers on the faculty vis-à-vis the number of minority students in the school system. The Court rejected the comparison between faculty population and student population and indicated that a more appropriate comparison was that between the minority teacher population in the relevant work area and the number of minority teachers employed in the school district. However, the Court made it clear that this comparison was not the only comparison that could be made in dealing with the statistical question. In a significant footnote the court said:

> Although the petitioners concede as a general matter the probative force of the comparative work force statistics, they object to the Court of Appeals' heavy reliance on these data on the ground that applicant flow data showing the actual percentage of white and negro applicants for teaching positions at Hazelwood would be firmer proof. As we have noted, . . . there was not clear evidence of such statistics. We leave it to the District Court on remand to determine whether competent proof of those data can be adduced. If so, it would, of course, be very relevant.

In addition to the question of applicant-flow data, the Court left for consideration the question of what constituted the relevant labor market. This issue was particularly significant because the school district had argued that special attempts by the City of St. Louis to maintain a 50 percent black teaching staff distorted comparisons of the relevant market when the number of black teachers in the St. Louis City school system were included in the relevant labor market area. The difference in statistical comparisons with and without the City of St. Louis was stark. Considering the City of St. Louis, the percentage of black teachers in the relevant labor market area per the 1970 census was 15.4 percent; without the City it was only 5.7 percent.

Hazelwood was one of three cases in which the Court considered the appropriate use of statistics in Title VII cases. In *International Brotherhood of Teamsters* v. *United States*,[18] the Court explained that "statistical analyses have served and will continue to serve an important role in cases in which the existence of discrimination is a disputed issue." This is as true in employment cases as it is in other areas. Statistics are important, not because Title VII requires an employer's workforce to be racially balanced (in fact, the Court makes it clear that Title VII does not), but because "imbalance is often a telltale sign of purposeful discrimination":

> Absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or

> less representative of the racial and ethnic composition of the population in the community from which employees are hired.

As in *Hazelwood* the Court cautions, however, that:

> Statistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all of the surrounding facts and circumstances.

In *Teamsters* the Court recognized that statistics based, in large part, on pre-Act conduct could be misleading, because only post-Act discrimination is prohibited. This same concept, which is of particular significance to public jurisdictions, is reflected in the *Hazelwood* Court's finding that it was inappropriate for the lower court to have disregarded the possibility that the statistical proof in the record could be rebutted by statistics dealing with the school district's hiring after March 1972:

> Racial discrimination by public employers was not made illegal under Title VII until March 24, 1972. A public employer who from that date forward made all its employment decisions in a wholly nondiscriminate way would not violate Title VII even if it had formerly maintained an all white work force by purposely excluding Negroes. For this reason the Court cautioned in the *Teamsters* opinion that once a prima facie case has been established by statistical work force disparities, the employer must be given an opportunity to show "that the claimed discriminatory pattern is a product of pre-Act hiring rather than unlawful post-Act discrimination."

Thus, while a public employer's posture prior to 1972 might be relevant for the purpose of drawing an inference that its discriminatory conduct continued (and this is particularly true where no changes were made in its hiring process), it is the public employer's post-1972 conduct that is at issue. Mere comparisons of the present workforce with the relevant labor market can, if there was pre-1972 discrimination, be grossly misleading, just as special programs within an area might lead to skewed statistical data. *Hazelwood* makes it clear that public employers are responsible for their post-1972 conduct, that workforce comparisons may be challenged if not related to post-1972 conduct, and that statistics are a tool whose usefulness depends on all of the surrounding facts and circumstances.

In *Dothard* v. *Rawlinson*,[19] the Court reconfirmed its statements regarding statistics in *Hazelwood*. Challenge was made to a state employer's height-and-weight requirements for prison guards; and the Court found it appropriate to compare general statistics for height and weight of women to height and weight for men—there being no showing that women in Alabama differed in these regards from women in general. Moreover, while *very* relevant in *Hazelwood*, applicant-flow data were irrelevant in *Dothard* because women who were below the height and weight established "could easily measure [their] height and weight and conclude that to make an application would be futile." Justice Rhenquist's opinion for himself, the chief justice, and Justice Blackmun sets forth a clear statement on the appropriate role of statistics:

> I agree that the statistics relied upon in this case are sufficient, absent rebuttal, to sustain a finding of a prima facie violation of § 703(a)(2), in that they reveal a significant discrepancy between the numbers of men, as opposed to women, who are automatically disqualified by reason of the height and weight requirements. The fact that these statistics are national figures of height and weight, as opposed to statewide or pool-of-labor-force statistics, does not seem to me to require us to hold that the District Court erred as a matter of law in admitting them into evidence. See *Hamling* v. *United States*, 418 U.S. 87, 108, 124-125 (1974); cf. *Zenith Corp.* v. *Hazeltine*, 395 U.S. 100, 123-125 (1969). It is for the District Court, in the first instance, to determine whether these statistics appear sufficiently probative enough of the ultimate fact in issue—whether a given job qualification requirement has a disparate impact on some group protected by Title VII. *Hazelwood School District* v. *United States*, ... U.S., at ...; Slip op. at 12 (1977); see *Hamling* v. *United States*, 418 U.S. at 108, 124-125; *Mayor* v. *Educational Equality League*, 415 U.S. 605; 621 n.20 (1974); see also *McAllister* v. *United States*, 348 U.S. 19 (1954); *United States* v. *Yellow Cab Co.*, 338 U.S. 340-342 (1949). In

making this determination, such statistics are to be considered in light of all other relevant facts and circumstances. Cf. *Teamsters* v. *United States*, ... U.S., ..., Slip op. at 14 (1977). The statistics relied on here do not suffer from the obvious lack of relevancy of the statistics relied on by the District Court in *Hazelwood School District* v. *United States*, ... U.S. at ...; Slip op. at 8. A reviewing court cannot say as a matter of law that they are irrelevant to the contested issue or so lacking in reliability as to be inadmissible.

If the defendants in a Title VII suit believe there to be any reason to discredit plaintiffs' statistics that does not appear on their face, the opportunity to challenge them is available to the defendants just as in any other lawsuit. They may endeavor to impeach the reliability of the statistical evidence, they may disparage in arguments or in briefs the probative weight which the plaintiffs' evidence should be accorded.

The *Dothard* decision is also relevant to the issue of sex discrimination in general. In addition to the height-and-weight requirement, which the Court struck because defendants could not justify that requirement (if strength were the motivating factor behind the requirement, the state should have applied a strength, not a height-and-weight, test; and no argument had been made that the *appearance* of strength was relevant to the job), the Court upheld the state's flat ban on the employment of women for contact positions in maximum-security prisons. The Court's judgment in this regard was based upon testimony from experts that the use of women as guards in contact positions in a male, maximum-security penitentiary would pose a substantial security problem, directly linked to the sex of the prison guard, and that sex was thus a bona fide occupational qualification for these positions. Hence, the state could properly restrict these positions to "men only." It is significant that, in reaching this conclusion, the Court did not apply the psychometric, job-relatedness approach applicable in employment testing cases or require changes in the state penitentiary system that could have had the effect of vitiating the security problems presented by having female guards. Perhaps most significant is the Court's unwillingness to allow the female applicant for the guard position to determine for herself whether she wishes to be placed in the dangerous position involved—"the likelihood that inmates would assault a woman because she was a woman would pose a real threat not only to the victim of the assault but also to the basic control of the penitentiary and protection of its inmates and other security personnel."

While *TWA* v. *Hardison*[20] was a private employment case, its holding and the philosophy surrounding that holding are equally applicable in the public sector. Title VII of the Civil Rights Act requires that an employer, private or public, make a reasonable accommodation to an employee's religious beliefs. TWA was found to have made that accommodation when it unsuccessfully attempted to get the union to seek a change of work assignments that would have resulted in Hardison's receiving Saturday as his day off. While such an arrangement was agreeable to the employer, the union refused. It was the Court's view that the employer was under no obligation to violate its collective bargaining agreement in order to provide for Hardison's Sabbath observance and that any proposed action, such as a four-day workweek, would require TWA to bear more than a *de minimus* cost and would constitute an undue hardship on the employer.

While *Hardison* is obviously relevant to the issue of religious accommodation, it may have far wider significance. The Court found that meeting Hardison's religious needs would require other employees to sacrifice their seniority. The Court would not "readily construe the statute to require an employer to discriminate against some employees in order to enable others to observe their Sabbath." This refusal to discriminate against some in order to meet the religious needs of others was based on the Court's view that the purpose of Title VII was to eliminate discrimination in employment and that this was true regardless of whether the discrimination was directed against majority or minority. This holding—that "similarly situated employees are not to be treated differently solely because they differ with respect to race, color, religion, sex, or national origin"—can have far-reach-

ing effect in the area of what remedies are available against public employers, the nature of an employer's affirmative action program, and generally how employers treat their respective employees. Four times now the Court has repeated the statement it made in *Griggs* v. *Duke Power Co.*—Title VII prohibits discrimination whether directed against the minority or majority.[21]

In addition to further explaining the appropriate use of statistics and upholding as bona fide a seniority system that, although neutral on its face, actually perpetuates pre-Act discrimination, the *Teamsters* case is highly relevant to the question of how to allocate relief in a class action. As in its decision in *Franks* v. *Bowman*[22] last year, the Court holds that once the plaintiff has established discrimination against the class, individual members of the class become the beneficiaries of a presumption that they are personally entitled to relief. The defendant, having already been found to be a wrongdoer, can only avoid the conclusion that an individual hiring decision was infected by discrimination by submitting sufficient evidence to overcome the inference of discrimination. (There is every reason to believe that this burden is the same whether the defendant is a private or a public employer.) In dealing with this question, the Court has applied a simple rule of logic: because the employer engaged in a pattern or practice of discrimination (or discriminated against a class), there is "reason to believe that its individual employment decisions were discriminatorily based. The proof of the pattern or practice supports an inference that any particular employment decision, during the period in which the discriminatory policy was in force, was made in pursuit of that policy." However, the inference is not open-ended; it only applies to those who are properly members of the class. For example, where the discrimination involved initial hire, the individual plaintiff is only entitled to the inference that he/she was discriminated against if the individual shows that he/she applied for the position. Nonapplicants are not totally disabled from obtaining relief, but because a nonapplicant:

> is necessarily claiming that he was deterred from applying for the job by the employer's discriminatory practices, his is the not always easy burden of proving that he would have applied for the job had it not been for those practices . . . when this burden is met, the nonapplicant is in a position analogous to that of an applicant. . . .

That the "burden of proving that he would have applied for the job had it not been for those [discriminatory] practices" is a heavy one is clearly shown by the fact pattern in *Teamsters*. It was not sufficient to meet this burden of proof to show that (1) it was futile to apply for the positions because of the scope and duration of the employer's discriminatory policies; (2) the nonapplicants for the positions involved were employed in other positions with the defendant employer and were fully aware of the futility of applying for the positions; and (3) the individuals seeking relief actually applied for the jobs involved after the Court entered its order for relief. Such generalized arguments are insufficient—"the Government [acting for the nonapplicants] must carry its burden of proof, with respect to each specific individual, at the remedial hearings to be conducted by the District Court on remand."

Last year, in this journal[23] it was noted that, by joining together the Supreme Court's decision in *Davis* v. *Washington* with a series of Court of Appeals decisions interpreting Section 703(h)'s provision that "[n]otwithstanding any other provision of . . . Title [VII], it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . .," it could be argued that the constitutional standard of discrimination—intent—rather than the Title VII standard—effect—applies to public-employer, merit-system testing. This year the Court made it clear that a seniority system that "[w]ere it not for § 703(h) . . . would fall under the *Griggs* rationale" and hence would violate Title VII, nonetheless could be upheld because it was "bona fide" and hence "immunized" by 703(h). The seniority system in *Teamsters* did, in fact, operate so as to freeze the status quo of discrimina-

tory practices entered into by the company prior to 1964. The effect of having separate seniority systems for over-the-road and city drivers had the effect of perpetuating past discrimination against minorities seeking over-the-road positions. However, the seniority system itself was "neutral" and, except for its effect of perpetuating past discrimination, legitimate. The Court's use of the word "neutral" is interesting because the Court in *Davis* had said:

> As an initial matter, we have difficulty understanding how a law establishing a racially *neutral* qualification for employment is nevertheless racially discriminatory and denies "any person equal protection of the laws" simply because a greater proportion of Negroes fail to qualify than members of other racial or ethnic groups. Had respondents, along with all others who had failed Test 21, whether white or black, brought an action claiming that the test denied each of them equal protection of the laws as compared with those who had passed with high enough scores to qualify them as police recruits, it is most unlikely that their challenge would have been sustained. Test 21, which is administered generally to prospective government employees, concededly seeks to ascertain whether those who take it have acquired a particular level of verbal skill; and it is untenable that the Constitution prevents the government from seeking modestly to upgrade the communicative abilities of its employees rather than to be satisfied with some lower level of competence, particularly where the job requires special ability to communicate orally and in writing. Respondents, as Negroes, could no more successfully claim that the test denied them equal protection than could white applicants who also failed. The conclusion would not be different in the face of proof that more Negroes than whites had been disqualified by Test 21. That other Negroes also failed to score well would, alone, not demonstrate that respondents individually were being denied equal protection of the laws by the application of an otherwise valid qualifying test being administered to prospective police recruits. [Emphasis added.]
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> A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.
>
> Given that rule, such consequences would perhaps be likely to follow. However, in our view, extension of the rule beyond those areas where it is already applicable by reason of statute, such as in the field of public employment, should await legislative prescription.

Can it be argued that state merit system statutes that require employment testing are themselves (and their tests) neutral (as was the case in *Davis*), even if their effects are disproportionate and hence not within the standards of *Griggs v. Duke Power Co.*? The full impact of *Davis* is yet to be seen by the public employer.[24]

CONCLUSION

While the Court was not as active this year in handling public employee cases, its decisions reflect a continuation of last year's discernable trends granting public employers greater rights in dealing with their employees while limiting previous decisions that had expanded employee rights. The Court, while not overturning the concept that a stigmatizing discharge gives rise to the right to a hearing, holds that the purpose of such hearing is to give the employee an opportunity to clear his/her name, not to obtain re-employment. Similarly, while it reaffirms the balancing concept of *Pickering*, the Court gives an employer, who considered an employee's protected speech in determining not to rehire him or her, the opportunity to show that it would have refused to rehire the nontenured employee, notwithstanding the speech.

Public employee unions fared somewhat better than last year, when the Court's *National League of Cities* decision put a damper on hopes of federal legislation requiring state and local government collective bargaining. Agency-shop agreements are constitutional and may be negotiated where permitted by state law, but fees collected from nonmembers may not be used for idealogical activity unrelated to collec-

tive bargaining activity. Moreover, when a public employer (*e.g.*, a school board) holds a public meeting it must grant individual employees the same opportunity to speak as is granted to other members of the public, even if such speech opposes the negotiating position of a union with exclusive bargaining rights.

In the EEO field, the Court clarified the role played by statistics in determining whether an employer discriminates, made it clear that the significant question in discrimination cases is whether the employer discriminated after the effective date of Title VII (1972 for public employers), held that an employer need not bear more than a *de minimus* cost in accommodating to an employee's religious beliefs, found that sex was a bona fide occupational qualification for the position of prison guard in a male, maximum-security penitentiary, and allocated the burden of proof on issues of relief between plaintiff and defendant in cases where class, or pattern-and-practice, discrimination was found.

Notes

1. *Wisconsin* v. *Constantineau,* 400 U.S. 433 (1971).
2. *Ibid.,* p. 437.
3. *Board of Regents* v. *Roth,* 408 U.S. 564 (1972).
4. *Ibid.,* pp. 573, 574.
5. *Ibid.,* p. 574, footnote 13.
6. *Paul* v. *Davis,* 424 U.S. 693 (1976).
7. *Ibid.,* p. 701.
8. *Bishop* v. *Wood,* 426 U.S. 341 (1976).
9. Carl F. Goodman, "Public Employment and the Supreme Court's 1975–76 Term," *Public Personnel Management,* vol. 5 (September–October 1976), pp. 287–302.
10. *Codd* v. *Velger,* 51 L. Ed. 2d 92 (1977).
11. *Pickering* v. *Board of Education,* 391 U.S. 563 (1968).
12. *Civil Service Commission* v. *Letter Carriers,* 413 U.S. 566 (1973).
13. *Arnett* v. *Kennedy,* 416 U.S. 134 (1974).
14. *Mount Healthy City Board of Education* v. *Doyle,* — U.S. —, 50 L. Ed. 471 (1977).
15. *City of Madison Joint School District* v. *Wisconsin Employment Relations Commission,* — U.S. —, 45 U.S.L.W. 4043 (1976).
16. *Abood* v. *Detroit Board of Education,* 425 U.S. 949 (1977).
17. *Hazelwood School District* v. *United States,* — U.S. —, 45 U.S.L.W. 4882 (1977).
18. *International Brotherhood of Teamsters* v. *United States,* — U.S. —, 45 U.S.L.W. (1977).
19. *Dothard* v. *Rawlinson,* — U.S. —, 45 U.S.L.W. 4888 (1977).
20. *TWA* v. *Hardison,* — U.S. —, 45 U.S.L.W. (1977).
21. *Griggs* v. *Duke Power Company,* 401 U.S. 424, 431 (1973); *McDonnell Douglas* v. *Santa Fe Trail Transportation Co.,* 427 U.S. 273, 280 (1976); *TWA* v. *Hardison,* — U.S. —, 45 U.S.L.W. 4672 (1977).
22. See Carl F. Goodman, "Equal Employment Opportunity: Preferential Quotas and Unrepresented Third Parties," *George Washington Law Review,* vol. 44 (May 1976), pp. 483–515; *Franks* v. *Bowman,* 424 U.S. 747 (1976).
23. Goodman in *Public Personnel Management,* vol. 5, p. 287.
24. The Court also decided some significant but highly technical questions affecting class actions (*East Texas Motor Freight* v. *Rodriguez,* — U.S. —, 45 U.S.L.W. 4524—mere affinity of race or ethnicity does not qualify one to be a class representative if the plaintiff does not "possess the same interest and suffer the same injury" as the class. Plaintiffs lacked the qualifications required for the position, hence "they could have suffered no injury as a result of the alleged discriminatory practices, and they were therefore, simply not eligible to represent a class of persons who did allegedly suffer injury"; *United Air Lines* v. *McDonald,* — U.S. —, 45 U.S.L.W. 4760—a purported member of an uncertified class may, upon settlement of named plaintiff's claim, appeal Court's refusal to certify class), and statutes of limitations (*International Union of Electrical, Radio and Machine Workers* v. *Myers,* — U.S. —, 45 U.S.L.W. 4068, following collective bargaining grievance procedures does not toll the 180-day limitation period for filing claim of discrimination with the EEOC; *Occidental Life Insurance Co.* v. *EEOC,* — U.S. —, 45 U.S.L.W. 4752—State statute of limitations does not apply to institution of suit under Title VII by the EEOC, but if delay significantly handicaps defendant the Court may provide the defendant relief).

PROBATIONARY GOVERNMENT EMPLOYEES AND THE DILEMMA OF ARBITRARY DISMISSALS

*Richard C. Johnson**

The subject of this article is probationary government employees and the conditions under which they can be dismissed from employment. In order to understand their legal status and the risks of arbitrary dismissal action to which they are subjected, it is necessary to start with an overview of the protections available to employees who have survived probation and acquired tenure.

Most federal employees in the competitive system are nonprobationary and are protected against arbitrary "adverse actions" such as dismissal, suspension or reduction in grade or pay.[1] Generally, tenured employees may be subjected to adverse actions only "for such cause as will promote the efficiency of the service."[2] "Cause" as it relates to the quality of an employee's work is not precisely specified by statute or regulation. On the other hand, causes that are related to employee conduct are defined by regulation to include "criminal, dishonest, infamous, or notoriously disgraceful conduct," "intentional false statement or deception or fraud in examination or appointment," "delinquency or misconduct in prior employment," and the like.[3] Adverse actions based on "marital status," "partisan

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1. 5 C.F.R. § 752.201(b) (1975). *See generally* Johnson & Stoll, *Judicial Review of Federal Employee Dismissals and Other Adverse Actions*, 57 CORNELL L. REV. 178 (1972).

2. 5 U.S.C. §§ 7501(a), 7512(a) (1970); 5 C.F.R. § 752.104(a) (1975). In Arnett v. Kennedy, 416 U.S. 134, 159 (1974), the "efficiency of the service" standard was held not to be so broad and vague as to infringe first amendment rights of free speech and association.

3. 5 C.F.R. §§ 752.104(a), 731.202(a), (b) (1975), *as amended*, 40 Fed. Reg. 28047 (1975). The July 3, 1975 amendment also includes the following general criteria as to whether the proposed action will "promote the efficiency of the service":

> (1) Whether the conduct of the individual may reasonably be expected to interfere with or prevent effective performance in the position applied for or employed in; or
>
> (2) Whether the conduct of the individual may reasonably be expected to interfere with or prevent effective performance by the employing agency of its duties and responsibilities.

Id. § 731.202(a).

In Arnett v. Kennedy, 416 U.S. 134, 141 (1974), the Supreme Court found that regulations of the Civil Service Commission (5 C.F.R. §§ 735.201(a)-.209) gave "fur-

political reasons" or "discrimination because of race, color, religion, sex, or national origin" specifically are outlawed.[4]

Although the grounds on which an adverse action can be taken against a tenured federal employee are only partially delineated in the regulations, procedural implementation of these grounds is more circumscribed. The employee is entitled to advance notice of the proposed adverse action stating "any and all reasons, specifically and in detail."[5] Moreover, the employee has a right to review the material on which the notice is based,[6] and is entitled to a reasonable time to submit a written answer, which may include supporting affidavits.[7] Thereafter, the employee may make a personal appearance before a representative of the agency, but he is not entitled to a formal evidentiary hearing.[8] The decision must then be made at a higher level in the agency than that at which the charges originated, and the employee can appeal to the Civil Service Commission.[9] Within the Commission, the employee is entitled to a full evidentiary hearing before an examiner of the Federal Employee Appeals Authority.[10] He has a further limited right to "reopening and reconsideration" before the Commission's Appeals Review Board.[11] In short, the tenured employee is afforded at least the minimum guarantees of procedural due process.[12]

Things are quite different for so-called "probationary" employees. Undifferentiated in anything but length of service, they enjoy virtually none

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ther specific content to the general removal standard." 416 U.S. at 141. These regulations pertain to conflicts of interest and employee codes of conduct. They are not specifically cross-referenced in the sections prescribing "adverse actions" and it is doubtful whether violations of them automatically would constitute grounds for an adverse action under any of the listed standards of section 731.202. Thus, these sections are not sure guides to what constitutes such action as will "promote the efficiency of the service."

4. 42 U.S.C. § 2000e-2(a) (1970); 5 C.F.R. § 752.104(b) (1975); *Id.* §§ 713.201-.283 (1975). The prohibition against adverse actions based on "partisan political reasons" implements 5 U.S.C. § 7324(b) (1970) (The Hatch Act). That section of the statute does not use the word "partisan," which was added to the regulation in 1974. 39 Fed. Reg. 32541 (1974). It is questionable whether section 7324(b) can be so narrowly limited by administrative regulation. *See* Holden v. Finch, 446 F.2d 1311, 1316 (D.C. Cir. 1971); Peale v. United States, 325 F. Supp. 193, 194-95 (N.D. Ill. 1971).

5. 5 C.F.R. § 752.202(a)(1) (1975).

6. *Id.* § 752.202(a)(2).

7. *Id.* § 752.202(b).

8. *Id.*

9. *Id.* § 752.202(f).

10. *Id.* § 772.307(b).

11. *Id.* § 772.310.

12. Arnett v. Kennedy, 416 U.S. 134, 147-58 (1974). Subsequent to *Arnett*, the regulations were revised. 39 Fed. Reg. 32542, 32545-47 (1974). Since the salient features of notice of the charges, right to respond, right to a written decision and right to a full evidentiary hearing on appeal were preserved, the holding of *Arnett* that these procedures comport with due process is unlikely to be affected by the changes.

of these substantive or procedural protections against arbitrary governmental conduct. Moreover, probationary employees are not an insignificant group, given annual accessions to the federal work force of approximately 20 percent of the total employed.[13]

Under regulations of the Civil Service Commission, the federal probationary period is fixed at one year.[14] Within that year an employee may be dismissed if "his work performance or conduct . . . fails to demonstrate his fitness or his qualifications for continued employment. . . ." [15] But, he may not be dismissed because of "race, color, religion, sex, national origin, or age," [16] or for "partisan political reasons or marital status or . . . improper discrimination because of physical handicap." [17] Procedurally, the employing agency is required to do no more than notify the probationary employee in writing of the reasons for his separation and the effective date of the action.[18] The notice shall "as a minimum, consist of the agency's conclusions as to the inadequacies of his performance or conduct." [19] The employee is not entitled to respond, has no access to the details of any charges, has no right to a hearing, and, except in the case of alleged discrimination or a dismissal premised on pre-employment conduct, has no right of appeal whatsoever.[20] In the latter instance, the employee may appeal to the Civil Service Commission on specific allegations of discrimination and may appeal at the agency level on grounds of procedural irregularity in the case of dismissal for pre-employment conduct.[21] However, there is no provision for a hearing in either instance. In sum, probationary employees in the federal service form a class apart, essentially without statutory or regulatory protection against arbitrary dismissal action.

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13. U.S. CIVIL SERVICE COMM'N, FEDERAL CIVILIAN MANPOWER STATISTICS 30 (1974) (Table 18). In 1973, the accession rate was 19.9 percent for all civilian employees. A total of 543,252 employees were taken on in various categories, against a total average employment for the year of 2,730,075. However, not all accessions were necessarily subject to a year of probation. 5 C.F.R. § 315.801 (1975) excepts some reinstated, transferred, reassigned or "excepted" employees who are nonetheless counted in the statistics as accessions. *See* Marcus v. United States, 473 F.2d 896, 898 (Ct. Cl. 1973); Horne v. United States, 419 F.2d 416, 419 (Ct. Cl. 1969). The exact number of accessions subject to probation cannot be determined from the published statistics.

14. 5 C.F.R. § 315.802 (1975).

15. *Id.* § 315.804.

16. 42 U.S.C. § 2000e-2(a) (1970); 5 C.F.R. § 315.806(b) (1974), *as amended,* 40 Fed. Reg. 15380 (1975). The prohibition against age discrimination applies only if at the time of the alleged act of discrimination "the employee was at least 40 years of age but less than 65 years of age." *Id.*

17. 5 C.F.R. § 315.806(b)(2) (1975).

18. *Id.* § 315.804.

19. *Id.*

20. *Id.* §§ 315.804-.806, *as amended,* 40 Fed. Reg. 15380 (1975). FEDERAL PERSONNEL MANUAL, ch. 315, subch. 8, ¶ 8-4 (1975).

21. *Id.*

I. The Ohio System of Probationary Employment

Various statewide civil service systems also provide for an initial period of probation. Ohio is one example. By an amendment added in 1912, the Ohio Constitution sets forth the general rule that: "Appointments and promotions in the civil service . . . shall be made according to merit and fitness, to be ascertained, as far as practicable, by competitive examinations." [22] Under statutes first enacted in 1913,[23] an employee whose appointment or promotion has become "final" acquires tenure "during good behavior and efficient service." [24] He may be reduced in pay or position, suspended for more than five working days, or removed only for enumerated causes such as incompetency, inefficiency, dishonesty and neglect of duty.[25] Procedurally, he is entitled to a copy of the order stating the reasons for the action, which order must also be filed with the director of administrative services and the state personnel board of review, or with the civil service commission.[26] Although no hearing is guaranteed prior to the effective date of the action, the employee, within ten days after the filing of the order, may file a written appeal with the state personnel board of review or the commission, which must within 30 days hold a hearing.[27] The authority seeking to uphold the adverse action carries the burden of proof.[28] The reviewing authority may affirm, disaffirm or modify the action of the appointing authority.[29] In cases of removal or reduction in pay only, both the employee and the appointing authority have a right of appeal to the court of common pleas, which hears the matter on the record as certified by the agency.[30] There, the authority seeking the adverse action still bears the burden of proof.[31] Special rules apply to members of the police and fire departments of cities and civil service townships.[32]

Like its federal counterpart, Ohio's civil service system mandates a probationary period, variable within a set maximum and minimum and fixed

22. Ohio Const. art. XV, § 10. *See* Kluth v. Andrus, 91 Ohio App. 1, 10, 101 N.E.2d 310, 314-15 (Cuyahoga County 1951), *aff'd*, 157 Ohio St. 279, 105 N.E.2d 579 (1952).

23. Kluth v. Andrus, 91 Ohio App. 1, 10, 101 N.E.2d 310, 315 (Cuyahoga County 1951), *aff'd*, 157 Ohio St. 279, 105 N.E.2d 579 (1952).

24. Ohio Rev. Code § 124.34 (Baldwin 1974).

25. *Id.*

26. *Id.*

27. *Id.*

28. *Cf.* Cupps v. City of Toledo, 118 Ohio App. 127, 133, 193 N.E.2d 543, 546 (Lucas County 1960).

29. Ohio Rev. Code § 124.34 (Baldwin 1974).

30. *Id.*

31. *Cf.* Cupps v. City of Toledo, 118 Ohio App. 127, 133, 193 N.E.2d 543, 546 (Lucas County 1960).

32. Ohio Rev. Code § 124.34 (Baldwin 1974). The appeal and hearing are entrusted to the municipal or township civil service commission. Appeal "on questions of law and fact" lies to the county court of common pleas, and must be taken within thirty days. *Id.*

by state regulation at from four to six months: "All original and promotional appointments . . . shall be for a probationary period, not less than sixty days nor more than one year . . . and no appointment or promotion is final until the appointee has satisfactorily served his probationary period." [33] The statute, which has been in substantially the same form since 1931,[34] differs significantly from the federal example in its explicit coverage of promotions as well as initial entries. This in itself accounts for a substantial part of the litigation concerning probationary appointments that has occupied the Ohio courts.[35] As implemented, Ohio law provides generally for a shorter period of probation [36] than does the federal system. It gives some substance to the concept of a "full and fair trial" on the job by providing that a probationary employee may not be removed during the first half of his probationary period or his first 60 days, whichever is longer, except under the notice, hearing and judicial review provisions applicable to tenured employees.[37]

Otherwise, the Ohio statute follows its rigorous federal predecessor. At or before the expiration of probation, the employee may be dismissed by decision of the appointing authority indicating "the reason for such decision." [38] The statute contains no specification for grounds for dismissal or reduction other than that "the service of the probationary employee is unsatisfactory." [39] The statute itself affords no administrative or judicial ap-

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33. *Id.* § 124.27. This section also provides that *original* appointments in the police or fire departments "shall be for a probationary period of one year." The Administrative Rules of the Director of State Personnel establish a probationary period for employees in the state service of from 120 to 180 calendar days based on pay range, and for county employees of 120 days. In both instances the period may be increased up to one year upon authorization of the Director. OHIO DEP'T OF STATE PERSONNEL, ADMINISTRATIVE RULES OF THE DIRECTOR OF STATE PERSONNEL, RULES PL-15-02, -15-03 (1972) [hereinafter cited as ADMINISTRATIVE RULES]. The same probationary periods apply to promotions. *Id.* RULE PL-19-12.

34. *See* Kluth v. Andrus, 91 Ohio App. 1, 11, 101 N.E.2d 310, 315 (Cuyahoga County 1951).

35. *See, e.g.*, State *ex rel.* Harris v. Haynes, 157 Ohio St. 214, 105 N.E.2d 53 (1952); State *ex rel.* Sullivan v. Village of Middleburg Heights, 114 Ohio App. 354, 174 N.E.2d 777 (Cuyahoga County 1961); Kluth v. Andrus, 91 Ohio App. 1, 101 N.E.2d 310 (Cuyahoga County 1951), *aff'd*, 157 Ohio St. 279, 105 N.E.2d 579 (1952); State *ex rel.* Phillips v. Dillon, 36 Ohio L. Abs. 63, 42 N.E.2d 999 (Ct. App. Clark County 1942).

36. Federal employees serve a probationary term uniformly fixed at one year. 5 C.F.R. § 315.802 (1975).

37. OHIO REV. CODE § 124.27 (Baldwin 1974). *Compare* 5 C.F.R. § 315.804 (1975) which places no time limits on termination of federal employees during probation.

38. OHIO REV. CODE § 124.27 (Baldwin 1974). ADMINISTRATIVE RULES, *supra*, note Rule PL-15-01, provides that the notice shall contain "the reasons for such removal, showing the respects in which the employee's service was not satisfactory. . . ."

39. OHIO REV. CODE § 124.27 (Baldwin 1974).

peal of any kind, even for dismissals claimed to be racially or politically motivated.

State courts applying the statute have without exception barred administrative and judicial review of probationary dismissals or reductions. Thus, higher state authorities have no power to review the adequacy of the reasons stated for a probationary dismissal or reduction, as long as the statement is not frivolous on its face.[40] The grounds stated for the dismissal by the appointing authority need not list specific acts or omissions, but need only set forth an opinion as to whether the probationary appointee satisfactorily served his probationary period.[41] Generalized statements such as "poor judgment," "lacks tact," "does not plan work," [42] "lack of executive ability," and "does not command the confidence and respect of the men" [43] have successfully passed judicial scrutiny. Even an employee alleging arbitrary and capricious action, such as a dismissal motivated solely by political reasons, has no opportunity to prove his case because he apparently will not be heard in any state forum.[44] In short, Ohio law as presently construed places virtually no limit on the discretion of the employing authority during the probationary period.

II. Legislative Background of the Federal Probationary System

Inquiry into the rights of state and federal probationary employees requires some examination of the background of the probationary employment idea, for which the federal system furnishes the principal example. The federal statute prescribing a probationary period was enacted as part of the Pendleton Act of 1883.[45] That statute was a product of the civil

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40. State *ex rel.* Clements v. Babb, 150 Ohio St. 359, 367-68, 82 N.E.2d 737, 742 (1948). *Cf.* State *ex rel.* Stine v. Atkinson, 138 Ohio St. 217, 219, 34 N.E.2d 207, 208 (1941). *But cf.* State *ex rel.* Harris v. Haynes, 157 Ohio St. 214, 222-23, 105 N.E.2d 53, 57 (1952).

41. State *ex rel.* Clements v. Babb, 150 Ohio St. 359, 367, 82 N.E.2d 737, 742 (1948). *But see* Administrative Rules, *supra* note 33, Rule PL-15-01.

42. State *ex rel.* Clements v. Babb, 150 Ohio St. 359, 367, 82 N.E.2d 737, 739 (1948).

43. State *ex rel.* Harris v. Haynes, 157 Ohio St. 214, 216, 105 N.E.2d 53, 54 (1952).

44. *Id.* at 223, 105 N.E.2d at 57; State *ex rel.* Artman v. McDonough, 132 Ohio St. 47, 50, 4 N.E.2d 982, 983 (1936). However, in State *ex rel.* Phillips v. Dillon, 36 Ohio L. Abs. 63, 42 N.E.2d 999 (Ct. App. Clark County 1942), a dismissed probationary police sergeant alleged discrimination on the part of the city manager. The city civil service commission held a hearing on the charges of discrimination and reversed the dismissal. The grounds of the court's decision did not require it to determine whether this procedure was proper.

45. Act of Jan. 16, 1883, ch. 27, § 2(2)(4), 22 Stat. 404. *See* Arnett v. Kennedy, 416 U.S. 134, 148-51 (1974) (Rehnquist & Stewart, JJ., & Burger, C.J., concurring). The Act's only reference to dismissals was a prohibition of dismissal for failure to make political contributions or render political services. Act of Jan. 16, 1883, ch. 27, § 2(2)(5), 22 Stat. 404.

service reform movement in reaction to the abuses of the "spoils system."[46] The thrust of the Act was to free appointments to the federal civil service from political influence and to substitute a competitive selection process centering around a written examination.[47]

The Act included the provision that "there shall be a period of probation before any absolute appointment or employment. . . ."[48] But the Act did not define "absolute," and it deliberately left untouched and therefore subject to executive discretion *all* matters of tenure and dismissal of employees, both within and without the "period of probation." The bill's chief sponsor foresaw no need for legislative interference in this area, once the basic system of competitive, nonpolitical appointment was adopted:

> It is objected that this bill does not grapple with the questions of terms of office, and the power of removal.
>
> . . . But there is no necessity for entering upon either of these questions. The class of officers with which we are now dealing holds office at the pleasure of the head of the Department, or the local postmaster or collector. Removals are rarely asked for, under the spoils system, except to make a vacancy for a particular man. If another man is to be put in, especially if that other man be the favorite of nobody—be recommended by nobody—be the partisan servitor of no person and no party, if he be simply the most capable and fit man for the place, demands for removal will be made only for cause; and then the demand should be heeded. Under the merit system of appointment, the question of removal will be solved without legislation.[49]

The source of the probationary section is thus not to be found in any expressed legislative desire to confer less employment security on new employees, in contrast to those who had already served six months or a year and had acquired tenure. In fact, the justification offered for the probationary section was totally unrelated to employment security as we understand it today. It was offered in rebuttal to critics who argued against the new competitive system on grounds that it would restrict admittance to civil service to those who could pass a written examination, but who might show little or no practical aptitude for the work. This, it was argued, would result in imposing unsuitable subordinates on unwilling superiors to the detriment of the service. The bill's chief sponsor asserted that the probationary section provided the answer:

> . . . It provides expressly that "there shall be a period of probation, before any absolute appointment or employment;" and this for the express

46. 13 CONG. REC. 79-81 (1881) (remarks of Senator Pendleton). *See* Guttman, *The Development and Exercise of Appellate Powers in Adverse Action Appeals*, 19 AM. U.L. REV. 323-24 (1970). The legislative debate also found a point of focus in the assassination of President Garfield by a disappointed office seeker. 13 CONG. REC. 79-80 (1881) (remarks of Senator Pendleton).

47. 13 CONG. REC. 81-82 (1881) (remarks of Senator Pendleton).

48. Act of Jan. 16, 1883, ch. 27, § 2(2)(4), 22 Stat. 404.

49. 13 CONG. REC. 82 (1881) (remarks of Senator Pendleton).

> purpose of enabling the superior officer who is responsible for the character of the work to test "the qualifications, the fitness and deftness"—the words are aptly chosen—of the man who is to perform it. If in his judgment the probationer fails in these qualities, he will refuse to appoint.[50]

The focus was on defining the barriers to entrance into federal service, not on the procedural requirements for separations. More broadly, the probationary period was intended to curtail bureaucratic elitism—an attempt to even out competition between the smooth college graduate and the practical man, particularly the tried and tested but perhaps undereducated Civil War veteran. The legislators of 1883 were wary of the British system, which they perceived as admirably nonpolitical but subversively elitist.[51]

The drafters thus saw the probationary section as the practical portion of an examination for office so that no appointment would take place until this part of the "test" was passed. This is what they meant in designating an appointment "absolute." They simply did not consider the issue of lesser or greater procedures governing dismissals. A person was engaged, performed work and was paid, but he was not "appointed" until the requisite time had passed. After he was appointed, the competition was over and the position filled, but the incumbent could still be discharged at the discretion of his superiors.

This concept of probation apparently answered the criticism at which it was directed and stilled the detractors of the new system. After the Act became effective, moreover, the idea of probation as a kind of entrance test was faithfully carried forward in the annual reports of the Civil Service Commission. In its 1884 *Annual Report*, for example, the Commission stated:

> The probation is a practical scrutiny continued through six months in the very work which the applicant is to do. In this part of the system candid persons will find a sufficient answer to the common and oft-repeated objections based on the assumption that no merely literary examination can show all the qualities required in a good officer. Nobody pretends that an examination in any branch of learning is an adequate test of business capacity.[52]

The early reports noted, however, that experience did not seem to justify the requirement for a "practical test" of probation. In 1885, out of 109 persons "tested," only two failed to achieve absolute appointment.[53] In 1886, ten failed out of 385,[54] and for 1889 the Commission reported a

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50. *Id.* at 83.

51. *See id.* at 81; *Hearings on S. 133 Before the Senate Comm. on Civil Service*, 47th Cong., 1st Sess. 111, 141, 162 (1882), *reprinted in* S. REP. No. 576, 47th Cong., 1st Sess. (1882).

52. 1884 CIVIL SERV. COMM'N ANN. REP. 29. *See also* 1885 CIVIL SERV. COMM'N ANN. REP. 23.

53. 1885 CIVIL SERV. COMM'N ANN. REP. 24.

54. 1886 CIVIL SERV. COMM'N ANN. REP. 37.

failure rate of one in 50.[55] Thus, the Commission suggested that the probationary term might not be essential, though it was unquestionably useful.[56]

The probationary system, then, stemmed from concerns quite apart from those of federal employment security or tenure, which for all practical purposes did not then exist. The movement toward control of federal employee dismissals arose later and from independent sources. In 1892 Justice Holmes could write with supreme assurance from the Massachusetts bench that "[t]he petitioner may have a constitutional right to talk politics but he has no constitutional right to be a policeman." [57] Yet, in 1897 the first steps were taken administratively to limit dismissals to those for "just cause," and to provide procedural safeguards of written notice and an opportunity to reply.[58] In 1912 the Lloyd-La Follette Act limited dismissals from the competitive service to those "for such cause as will promote the efficiency of the service" and created the statutory procedural safeguards of written notice of charges, opportunity to provide a written answer with supporting affidavits, and the right to a written decision.[59] The Veterans' Preference Act of 1944 broadened the application of these rights to include "adverse actions" less severe than dismissal—suspensions, furloughs without pay and reductions in grade or pay—for preference eligible employees, and to include a right of appeal to the Civil Service Commission.[60] Regulations of the Civil Service Commission expanded these rights to encompass a full range of procedural safeguards including one or more evidentiary hearings.[61] In 1962 the protection afforded to preference eligibles was extended by executive order to employees in the competitive service across the board.[62]

Meanwhile, the tiny civil service of 1883 had grown to a force of several millions [63] and the concerns of that age, that an elitist class of professional state servants might monopolize the functions of government, were subsumed in the different, and perhaps greater, concerns of today. Yet, the

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55. 1889 CIVIL SERV. COMM'N ANN. REP. 18.

56. 1885 CIVIL SERV. COMM'N ANN. REP. 24. Note, however, that even today the Civil Service Commission adheres to the idea that the probationary period is "a final and highly significant step in the examining process." FEDERAL PERSONNEL MANUAL, ch. 315, subch. 8, ¶ 8-1a (1975).

57. McAuliffe v. Mayor & Bd. of Aldermen, 155 Mass. 216, 29 N.E. 517 (1892).

58. Exec. Order No. 101, July 27, 1897, *reprinted in* 1 PRESIDENTIAL EXECUTIVE ORDERS 11 (W.P.A. Historical Records Survey comp. 1944). For a concise description of these events, *see* Guttman, *supra* note 46, at 324-25.

59. Act of Aug. 24, 1912, ch. 389, § 6, 37 Stat. 555.

60. 5 U.S.C. §§ 7511, 7512, 7701 (1970).

61. *See* Johnson & Stoll, *supra* note 1, at 189-93. Note, however, that the dual agency system of appeals was abolished by executive order in 1974. Exec. Order No. 11787, 39 Fed. Reg. 20675 (1974).

62. Exec. Order No. 10987, 3 C.F.R. § 519 (1959-1963 Comp.).

63. Merrill, *Procedures for Adverse Actions Against Federal Employees*, 59 VA. L. REV. 196 (1973).

probationary system remained essentially unchanged. Progressive erosion of the right-privilege doctrine [64] as applied to federal employment and the concomitant rapid growth of procedural guarantees against arbitrary dismissals bypassed the probationer almost completely.[65] Enmeshed in an 1883 test for the practical assessment of "character, temper, manners" [66] and similar attributes, the probationary government employee remains at the effective mercy of his immediate supervisor.

III. Constitutional Protection Against Arbitrary Dismissals of Probationary Employees

A. *Procedural Due Process*

Summary dismissals of probationary employees in the state and federal civil service have been upheld as not violative per se of procedural due process.[67] The trend of recent decisions in this and analogous areas, however, requires a close look at the underlying rationale of the probationary dismissal cases to determine whether and to what extent they have continuing validity. The courts continue to frame their decisions in terms of "property" and "liberty" interests.

1. "Property" Interest

Applying the test of *Board of Regents v. Roth* [68] and *Perry v. Sindermann*,[69] the courts have held that probationary or nontenured employees have no "property" interest in their jobs because they have no reasonable

64. Arnett v. Kennedy, 416 U.S. 134, 211 (1974) (Marshall, J., dissenting). *See* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 Harv. L. Rev. 1439 (1968).

65. For example, in Arnett v. Kennedy, the Court carefully referred to the employee as "non-probationary" or "tenured." 416 U.S. at 136, 163, 166, 175, 193, 206, 221.

66. 13 Cong. Rec. 81 (1881) (remarks of Senator Pendleton).

67. For federal probationary employees, *see* Toohey v. Nitze, 429 F.2d 1332, 1334-35 (9th Cir.), *cert. denied*, 400 U.S. 1022 (1970); Jaeger v. Freeman, 410 F.2d 528, 531 (5th Cir. 1969); Medoff v. Freeman, 362 F.2d 472, 475 (1st Cir. 1966); Sayah v. United States, 355 F. Supp. 1008 (C.D. Cal. 1973); Heaphy v. United States Treasury Dep't, Bureau of Customs, 354 F. Supp. 396, 399-400 (S.D.N.Y. 1973), *aff'd*, 489 F.2d 735 (2d Cir. 1974). *Cf.* Sampson v. Murray, 415 U.S. 61, 80-81 (1974). For state probationary employees, including nontenured teachers, *see* Buhr v. Buffalo Pub. School Dist. No. 38, 509 F.2d 1196, 1199-1200 (8th Cir. 1974) (nontenured teacher in North Dakota); Russell v. Hodges, 470 F.2d 212, 216-17 (2d Cir. 1972) (New York state and city employees); Orr v. Trinter, 444 F.2d 128, 134-35 (6th Cir. 1971), *cert. denied*, 408 U.S. 943 (1972) (nontenured school teacher in Ohio); Tichon v. Harder, 438 F.2d 1396, 1399-1401 (2d Cir. 1971) (state welfare department employee in Connecticut).

68. 408 U.S. 564 (1972).

69. 408 U.S. 593 (1972).

expectancy of continued employment.[70] Federal and state statutes and regulations have been cited to establish the government employer's freedom either to continue or terminate the employment without reference to cause and thus to defeat any expectation that employment will continue except at the employer's whim.[71] The word "probationary" itself seems to carry an almost magical connotation that forecloses further inquiry. In one case, the court's reasoning took it no further than the conclusion that "plaintiff was admittedly a probationary employee; he has not asserted any contract or other mutual understanding or rule that would rise to such a claim of entitlement." [72]

However, the result in these and similar cases is imperiled by the Supreme Court's recent decision in *Goss v. Lopez*.[73] There, the Court held that an Ohio statute gave secondary school pupils a property interest in free public education. However, the same statute explicitly provided that students could be summarily suspended for up to ten days without advance notice, opportunity to contest the action, or hearing.[74] Five members of the Court held that, although one part of the Ohio statute served to create the necessary property interest, the companion section permitting summary suspensions was unconstitutional because it conflicted with the requirements of procedural due process.[75] The Court thus firmly endorsed the view that in defining property interests it is not necessary to consider the state or federal statutory scheme as a whole. It now appears that, contrary to the three-Justice opinion the preceding term in *Arnett v. Kennedy*,[76] it is not

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70. *See, e.g.*, Buhr v. Buffalo Pub. School Dist. No. 38, 509 F.2d 1196, 1199-1200 (8th Cir. 1974); Ring v. Schlesinger, 502 F.2d 479, 485-86 (D.C. Cir. 1974); Russell v. Hodges, 470 F.2d 212, 216-17 (2d Cir. 1972).

71. Buhr v. Buffalo Pub. School Dist. No. 38, 509 F.2d 1196, 1200 (8th Cir. 1974) (North Dakota statute); Ring v. Schlesinger, 502 F.2d 479, 485 (D.C. 1974) (Navy personnel regulations); Russell v. Hodges, 470 F.2d 212, 217 (2d Cir. 1972) (New York statute); Orr v. Trinter, 444 F.2d 128, 130 (6th Cir. 1971), *cert. denied*, 408 U.S. 943 (1972) (Ohio statute); Sayah v. United States, 355 F. Supp. 1008, 1015-16 (C.D. Cal. 1973) (federal civil service regulations); Heaphy v. United States Treasury Dep't, Bureau of Customs, 354 F. Supp. 396, 399 (S.D.N.Y.), *aff'd*, 489 F.2d 735 (2d Cir. 1973) (federal civil service regulations). *But see* Zimmerer v. Spencer, 485 F.2d 176, 177-78 (5th Cir. 1973) where a state college teacher was found to have sufficient property interest after six years of employment notwithstanding the absence of any formal tenure system enacted by statute or regulation.

72. Heaphy v. United States Treasury Dep't, Bureau of Customs, 354 F. Supp. 396, 400 (S.D.N.Y. 1973), *aff'd*, 489 F.2d 735 (2d Cir. 1973). *See also* Sayah v. United States, 355 F. Supp. 1008, 1015-16 (C.D. Cal. 1973).

73. 419 U.S. 564 (1975). *Accord*, Wood v. Strickland, 420 U.S. 308 (1975).

74. 419 U.S. at 567. OHIO REV. CODE § 3313.64 affords the benefit of free education. Section 3313.66 authorizes school principals to suspend pupils for up to ten days without advance notice, hearing or other due process attributes.

75. 419 U.S. at 572-75.

76. 416 U.S. 134 (1974) (Rehnquist, Stewart, JJ., & Burger, C.J., concurring). *See*, 59 MINN. L. REV. 421 (1974).

incumbent on the person accepting government benefits to "take the bitter with the sweet." [77]

Moreover, the opinion in *Goss v. Lopez* makes it extremely difficult to accept earlier decisions excluding probationary employees as a class from those who enjoy a property interest in their jobs. Typically, the central ingredient of state and federal civil service laws is that positions must be filled on the basis of merit and after competition.[78] The inescapable inference from this central theme is not only that *selections* of employees should not be capricious or haphazard, but also that *dismissals* should be rationally related to standards of performance capable of reasonably objective determination. The statutes calling for appointment by merit and after competition thus create an expectancy that the best man will obtain the job and that he will retain it.[79] Furthermore, upon accession—whether probationary or not—federal and state employees typically begin to acquire valuable rights to retirement benefits,[80] health care [81] and the like.[82] By the end of his first year, when his dismissal may still be abruptly and arbitrarily ordered by an immediate supervisor, a federal employee may have accrued one-twentieth of the absolute right to a lifetime pension far more valuable than the sum of his cash contributions to the pension fund.[83]

Nevertheless, in rejecting the claims of probationary employees to a property interest in their jobs, the courts have ignored these provisions and have turned instead to those sections of the statutes and regulations that are characterized as broadly permitting summary dismissal. In the case of federal employees, this characterization has no validity whatsoever, since no federal statute authorizes summary dismissal in so many words,[84] and the regulations provide a rudimentary standard of "inadequacies of . . . performance or conduct" even for probationers.[85] Moreover, this was pre-

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77. 416 U.S. at 153-54.

78. *See* notes 45-51 *supra* and accompanying text.

79. In Simmonds v. Government Employees' Serv. Comm'n, 375 F. Supp. 934 (D.V.I. 1974), the court adopted the following practical definition of "expectancy": "The Government in some manner must have indicated that the recipient could rely upon the benefit being continued absent a cause for termination." *Id.* at 935, *citing* Note, 86 HARV. L. REV. 880, 890 (1973).

80. 5 U.S.C. §§ 8301-48 (1970). Disability retirement is also provided, as are survivor annuities. *Id.* §§ 8337, 8341.

81. *Id.* §§ 8901-13.

82. *See, e.g., id.* §§ 8701-16 (group life insurance).

83. *Id.* § 8336(b). An employee who has completed five years of service and has attained age 62 is entitled to an annuity upon involuntary separation. *Id.* § 8336(e).

84. 5 U.S.C. § 3321 (1970) provides only that "there shall be a period of probation before an appointment in the competitive service becomes absolute," without further defining what is meant.

85. 5 C.F.R. § 315.804 (1975). *See* Harris v. Nixon, 325 F. Supp. 28, 31 (D. Colo. 1971).

cisely the kind of holistic approach rejected in the *Goss* discussion of property interest. If *Goss* represents the majority Court thinking at this time, then any attempt to distinguish between property interests and those of lesser value can be based only upon a subjective comparison of their worth. On the one hand, a comparison can be made between the employment benefits conferred by the state as against those of free public schooling. Conversely, a distinction can be sought in the comparative detriment attached to dismissal from government employment versus limited suspension from school. It is difficult to accept, however, that the benefit of government schooling, which may equip one for employment, deserves greater procedural safeguards than the benefit of government employment itself, or that a very limited suspension from school is inherently more serious than a complete deprivation of earnings which may devastate an average family unit. But the Supreme Court has yet to measure the *Goss* criteria against the cases dealing with the rights of probationary employees.

The difficulty that the Court would have in distinguishing *Goss* from probationary rights cases is heightened by a review of other recent decisions considering property interests. A significant broadening of procedural due process guarantees has resulted from courts' findings of property interests in such diverse areas as welfare benefits,[86] unemployment compensation,[87] garnishment,[88] replevin,[89] and rent increases.[90] In each instance, substantially the same comparison of benefits and detriments can be made to the government employment field, and painstaking distinctions can be drawn, as they have been in the case of welfare benefits.[91] But practical and fair-minded persons must be left with a sense of growing dissatisfaction and unease.

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86. Goldberg v. Kelly, 397 U.S. 254 (1970).

87. Smith v. District Unemployment Comp. Bd., 435 F.2d 433 (D.C. Cir. 1970). *See* Christian v. New York State Dep't of Labor, 347 F. Supp. 1158 (S.D.N.Y. 1972) (three-judge court), *rev'd*, 414 U.S. 614 (1974).

88. Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969).

89. Fuentes v. Shevin, 407 U.S. 67 (1972).

90. Geneva Towers Tenants' Org. v. Federated Mtg. Investors, 504 F.2d 483 (9th Cir. 1974). *But see* Harlib v. Lynn, 511 F.2d 51 (7th Cir. 1975); Paulsen v. Coachlight Apartments Co., 507 F.2d 401 (6th Cir. 1974).

91. Discussing *inter alia* Goldberg v. Kelly, 397 U.S. 254 (1970), Justice Rehnquist stated in *Arnett:* "These cases deal with areas of the law dissimilar to one another and dissimilar to the area of governmental employer-employee relationships with which we deal here." 416 U.S. at 155. Justices Marshall, Brennan and Douglas, however, discerned no meaningful distinction: "This case and *Goldberg* invoke the termination of income, whether in salary or public assistance payments, upon which the recipient may depend for basic sustenance." *Id.* at 216. Nevertheless, in Tichon v. Harder, 438 F.2d 1396 (2d Cir. 1971), the court stated: "[U]nlike welfare recipients, who exist at a bare subsistence level, it cannot be said that an employee's rights to the profits from his job entail 'some sort of right to exist in society' . . . ." *Id.* at 1400.

2. "Liberty" Interest

The *Roth*[92] decision also held that an individual's separate and independent "liberty" interest might be so affected by his dismissal from government employment as to invoke procedural due process guarantees. This could occur, the Court stated, where the dismissal was accompanied by charges which might "seriously damage his standing and associations in his community,"[93] and which in turn could reasonably be expected to jeopardize the employee's ability to find new and comparable employment. Here, the purpose of extending procedural due process safeguards would be less to permit the employee to recapture his lost job than to afford him the opportunity to "clear his name."[94] Lower court decisions have emphasized that the circumstances surrounding the dismissal must be of extraordinary seriousness for the liberty interest to be invoked.[95]

Following this reasoning, any potential deprivation of liberty could be sidestepped simply by effecting the dismissal without any accompanying statement of charges, reasons or conclusions.[96] However, dismissal from government employment for no stated reason and under no standard whatsoever may raise even thornier constitutional issues.[97] Moreover, most civil service statutes and regulations require that even probationary employees be furnished a written statement of conclusions or reasons for the dismissal.[98] Once such a statement has been furnished, there is a further question whether the reasons for the dismissal must somehow be made public before the employee can successfully claim a deprivation of liberty.[99] How-

92. Board of Regents v. Roth, 408 U.S. 564 (1972).

93. *Id.* at 573.

94. *Id.* at n.12.

95. In Russell v. Hodges, 470 F.2d 212 (2d Cir. 1972), the court suggested that "charges of chronic alcoholism or association with subversive organizations" would be of the type to which a liberty interest attached, while "a charge of failure to perform a particular job, lying within the employee's power to correct" was not. *Id.* at 217. In Tichon v. Harder, 438 F.2d 1396 (2d Cir. 1971), decided before *Roth*, the court held that no liberty interest was involved "in the absence of a clear, immediate and substantial impact on the employee's reputation which effectively destroys his ability to engage in his occupation . . . ." *Id.* at 1402.

96. Board of Regents v. Roth, 408 U.S. 564 (1972); Russell v. Hodges, 470 F.2d 212, 217 (2d Cir. 1972); Orr v. Trinter, 444 F.2d 128, 131 (6th Cir. 1971), *cert. denied*, 408 U.S. 943 (1972).

97. *See* Arnett v. Kennedy, 416 U.S. 134, 158-64 (1974) (Rehnquist & Stewart JJ., & Burger, C.J., concurring); *Id.* at 164 (Powell & Blackmun, JJ., concurring); *Id.* at 177 (Marshall, Douglas, & Brennan, JJ., dissenting). In *Arnett*, the issue was whether the "such cause as will promote the efficiency of the service" standard of the Lloyd-La Follette Act was unconstitutionally vague and overbroad as a regulation of employees' speech. The Court held six to three that it was not.

98. *See* notes 18-19 *supra* and accompanying text.

99. *See* Buhr v. Buffalo Pub. School Dist. No. 38, 509 F.2d 1196, 1199-1200 (8th Cir. 1974); Tichon v. Harder, 438 F.2d 1396, 1401 (2d Cir. 1971).

ever, most courts have proceeded directly to an examination of the reasons surrounding the dismissal, public or not, as against the *Roth* standard.[100]

Since deprivation of liberty is independent of any property interest the employee may have in his government position, probationary employees stand on a par with their tenured counterparts in this regard. Sufficient infamy to invoke the "liberty" interest of procedural due process has been found in dismissals based on "gross misconduct, insubordination, and hostile attitude towards fellow employees," [101] "[i]nsubordination and . . . continual practice of not complying with departmental rules and regulations," [102] submission of an incorrect or false voucher and diversion of an Air Force plane for personal use,[103] and mental instability.[104] Other courts have ruled that insufficient infamy attaches to dismissals based on "submission of travel vouchers under false pretentions," [105] improper conduct of customs examinations and absence without leave,[106] and "strong and adverse effect upon the morale and working environment of [the] office." [107]

In *Goss v. Lopez*,[108] discussed earlier, the Supreme Court held that sufficient infamy attached to misconduct charges against high school students based variously on "disruptive or disobedient conduct committed in the presence of the school administrator" and school "disturbances" [109] to infringe the liberty interest and invoke procedural due process guarantees:

> If sustained and recorded, those charges could seriously damage the students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment. It is apparent that the claimed right of the State to determine unilaterally and without process whether that misconduct has occurred immediately collides with the requirements of the Constitution.[110]

The damage to an individual's standing or reputation created by any dismissal from public employment for failure to render satisfactory or acceptable service seems at least equally as great as the damage found by the Court to have occurred in *Goss*. The standards for satisfactory govern-

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100. *See* notes 101-07 *infra*.

101. Buggs v. City of Minneapolis, 358 F. Supp. 1340, 1343 (D. Minn. 1973).

102. Simmonds v. Government Employees' Serv. Comm'n, 375 F. Supp. 934, 937 (D.V.I. 1974).

103. Rolles v. Civil Serv. Comm'n, 512 F.2d 1319, 1320 (D.C. Cir. 1975).

104. Lombard v. Board of Educ., 502 F.2d 631, 637 (2d Cir. 1974), *cert. denied*, 420 U.S. 976 (1975).

105. Medoff v. Freeman, 362 F.2d 472, 476 (1st Cir. 1966).

106. Heaphy v. United States Treasury Dep't, Bureau of Customs, 354 F. Supp. 396, 398, 400-01 (S.D.N.Y. 1973), *aff'd*, 489 F.2d 735 (2d Cir. 1974).

107. Sayah v. United States, 355 F. Supp. 1008, 1010, 1015 (C.D. Cal. 1973).

108. 419 U.S. 565 (1975).

109. *Id.* at 569, 570.

110. *Id.* at 575.

ment service are not extraordinarily high [111] and failure to meet them for whatever reason carries heavy overtones of incompetence. Moreover, all reasons for such dismissals, whether publicized or not, tend to find their way into data banks.[112] It is unrealistic to blink at the serious, perhaps insuperable, difficulties that a dismissed public employee may experience in finding alternate employment, due merely to the fact that he has been fired by the government.[113] Thus, the holding in *Goss* may prompt a favorable reassessment of the liberty interest of probationary employees.

B. *Probationary Dismissals Infringing Substantive Constitutional Rights*

1. The Right to Contest Dismissals Based on Constitutionally Impermissible Grounds

Additional constitutional questions, involving infringement of substantive rights, are frequently raised in connection with probationary dismissals. Dealing with nontenured college teachers, both *Roth* [114] and *Sindermann* [115] reaffirmed the Court's established position that dismissals ordered in retaliation against attempted exercise of protected first amendment rights of speech and association are invalid:

> For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly." [116]

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111. *See, e.g.*, Marcus v. United States, 473 F.2d 896, 900 (Ct. Cl. 1973):

> It is unfortunately true that long service in a tenured position in Government is no guarantee of competence. As everyone knows, tenure sometimes protects incompetence, and the only reason why it is tolerated is that its alternative, the spoils system, fosters incompetence even more.

112. Sampson v. Murray, 415 U.S. 61, 96 (1974) (Douglas, J., dissenting):

> There is no frontier where the employee may go to get a new start. We live today in a society that is closely monitored. All of our important acts, our setbacks, the accusations made against us go into data banks, instantly retrieved by the computer.

113. Arnett v. Kennedy, 416 U.S. 134, 219-21 (1974) (Marshall, Douglas & Brennan, JJ., dissenting); Sampson v. Murray, 415 U.S. 61, 101-02 (1974) (Marshall & Brennan, JJ., dissenting).

114. Board of Regents v. Roth, 408 U.S. 564 (1972).

115. Perry v. Sindermann, 408 U.S. 593 (1972).

116. *Id.* at 597.

These decisions followed numerous prior cases,[117] including a number specifically involving probationary government employees.[118] Moreover, the first amendment guarantees of speech and association referred to in *Roth* are illustrative but not inclusive of substantive constitutional rights that may be involved in probationary cases. Equally deserving of protection are the probationer's other substantive rights to free exercise of religion,[119] avoidance of self-incrimination [120] and the like.[121] Although the probationary system, with its distinctly reduced procedural rights for one class of civil servants, has been held not to violate equal protection per se,[122] the system as applied by the federal and state governments must still meet the constitutional test of reasonable classification of employee groups in terms of the procedural and substantive benefits granted.[123]

2. Dismissals Asserted to be "Arbitrary and Capricious"

Federal probationary employees have frequently been permitted to challenge their dismissals on the grounds that they were "arbitrary and capricious," *i.e.*, that the reasons stated were frivolous and wholly unsupported by fact.[124] Only rarely, however, have the courts articulated the underlying basis for such review.[125] In a few cases, courts have cited the re-

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117. *See, e.g.*, Pickering v. Board of Educ., 391 U.S. 563, 568 (1968).

118. *See, e.g.*, Holden v. Finch, 446 F.2d 1311, 1315 (D.C. Cir. 1971); *cf.* Orr v. Trinter, 444 F.2d 128, 134 (6th Cir. 1971), *cert. denied*, 408 U.S. 943 (1972); Peale v. United States, 325 F. Supp. 193 (N.D. Ill. 1971). *See also* Ring v. Schlesinger, 502 F.2d 479, 487-90 (D.C. Cir. 1974).

119. *See, e.g.*, Harris v. Nixon, 325 F. Supp. 28, 29; 36 (D. Colo. 1971).

120. Slochower v. Board of Higher Educ., 350 U.S. 551 (1955). *See also* Orr v. Trinter, 444 F.2d 128, 134 (6th Cir. 1971), *cert. denied*, 408 U.S. 943 (1972).

121. *See* Orr v. Trinter, 444 F.2d 128, 134 (6th Cir. 1971), *cert. denied*, 408 U.S. 943 (1972).

122. Russell v. Hodges, 470 F.2d 212, 217-18, 218 n.6 (2d Cir. 1972). *Cf.* Christian v. New York State Dep't of Labor, 347 F. Supp. 1158, 1162 (S.D.N.Y. 1972), *rev'd*, 414 U.S. 614 (1974).

123. Berenguer v. Dunlavey, 352 F. Supp. 444, 447-48 (D. Del. 1972), *vacated*, 414 U.S. 895 (1973): "While a state has discretion in the selection of the privileges and rights it will confer on different classes of employees, the classification chosen must be reasonable."

124. *See, e.g.*, Anonymous v. Kissinger, 499 F.2d 1097, 1102 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 990 (1975); Young v. United States, 498 F.2d 1211, 1222-23 (5th Cir. 1974); Horne v. United States, 419 F.2d 416 (Ct. Cl. 1969); Powers v. United States, 169 Ct. Cl. 626 (1965); Greenway v. United States, 163 Ct. Cl. 72 (1963). *Contra*, Jaeger v. Freeman, 410 F.2d 528, 531 (5th Cir. 1969); Bennett v. United States, 356 F.2d 525 (Ct. Cl.), *vacated*, 384 U.S. 4 (1966).

125. For example, no basis at all was stated in Toohey v. Nitze, 429 F.2d 1332, 1334 (9th Cir. 1970), *cert. denied*, 400 U.S. 1022 (1971); Cohen v. United States, 384 F.2d 1001 (Ct. Cl. 1967); Dargo v. United States, 176 Ct. Cl. 1193 (1966); Greenway v. United States, 163 Ct. Cl. 72 (1963). *See generally* Johnson & Stoll, *supra* note 1, at 180-88.

view provisions of the Administrative Procedure Act.[126] Other cases have held or intimated that dismissal of probationary employees for arbitrary and capricious reasons is unconstitutional under the fifth amendment.[127]

The presence or absence of an underlying constitutional basis for court review of arbitrary and capricious dismissals of federal probationers may be of only academic interest. But, in the case of state employees, the question is of substantial importance since it determines the availability of federal court relief. Not surprisingly, the circuits are not in complete agreement on this issue,[128] and the Supreme Court has yet to decide a case in which the question is squarely presented.[129] It is admittedly difficult to harmonize the granting of any constitutional protection against arbitrary and capricious dismissals with the apparent holding in *Roth* that the state is free to dismiss a nontenured teacher for no reason at all.[130] Nevertheless, when the state elects to require that grounds for dismissals be articulated, there is little justification for granting state authorities unbridled license to ignore the facts and to fabricate a basis for the dismissal that will nonetheless be secure against any challenge of falsehood. This is all the more true where the stated reasons for the dismissal or nonrenewal may find their way into the employee's personnel records, notwithstanding that his liberty interest may be held insufficient to invoke the guarantees of procedural due process.

3. Adequacy of the Judicial and Administrative Remedies

Federal probationary employees asserting violations of substantive constitutional rights or arbitrary and capricious action in connection with their dismissals are most often remanded to the Civil Service Commission for

126. Young v. United States, 498 F.2d 1211, 1218-22 (5th Cir. 1974); Heaphy v. United States Treasury Dep't, Bureau of Customs, 354 F. Supp. 396, 401 (S.D.N.Y. 1973), *aff'd*, 489 F.2d 735 (2d Cir. 1974); Harris v. Nixon, 325 F. Supp. 28, 32 (D. Colo. 1971).

127. Anonymous v. Kissinger, 499 F.2d 1097, 1102 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 990 (1975); Scott v. Macy, 349 F.2d 182, 183-84 (D.C. Cir. 1965); Heaphy v. United States Treasury Dep't, Bureau of Customs, 354 F. Supp. 396, 401 (S.D.N.Y. 1973), *aff'd*, 489 F.2d 735 (2d Cir. 1973). *Cf.* Sampson v. Murray, 415 U.S. 61, 94 n.1 (1974); Tichon v. Harder, 438 F.2d 1396, 1398 (2d Cir. 1971). *See* Merrill, *supra* note 63, at 201-02.

128. In Orr v. Trinter, 444 F.2d 128 (6th Cir. 1971), *cert. denied*, 408 U.S. 943 (1972), the Sixth Circuit suggested a constitutional standard against "patently arbitrary or discriminatory" dismissals. *Id.* at 135. But in Buhr v. Buffalo Pub. School Dist. No. 38, 509 F.2d 1196 (8th Cir. 1974), the Eighth Circuit rejected any independent constitutional basis for reviewing "arbitrary and capricious" dismissals of state employees where the employee fails to establish a prior right to procedural due process: "A claim of total insufficiency of evidence, disembodied and cast adrift from procedural due process rights, is not a claim to be addressed in federal court." *Id.* at 1203. *Accord*, Jeffries v. Turkey Run Consol. School Dist., 492 F.2d 1 (7th Cir. 1974).

129. *Cf.* Wood v. Strickland, 420 U.S. 308, 321-22 (1975); Goss v. Lopez, 419 U.S. 565, 573-74 (1975).

130. Board of Regents v. Roth, 408 U.S. 564, 573-74 (1972). *See* Buhr v. Buffalo Pub. School Dist. No. 38, 509 F.2d 1196, 1202 (8th Cir. 1974).

an administrative hearing.[131] But, in some federal employee cases,[132] and in cases involving state employees asserting violation of federal rights,[133] the hearing is held in the federal district court. However, without supporting affidavits, the bare assertion that constitutional rights have been infringed may be insufficient to secure the right to a hearing in any forum.[134]

Even if a hearing has been ordered, the dismissed probationary employee still faces difficult hurdles that tend to make his remedy more theoretical than real. First, he has lost his federal or state job and is almost certain to be denied any interlocutory relief.[135] Moreover, he is at a further disadvantage compared to tenured employees whose dismissals are conditioned upon a showing of cause. The latter are entitled to explicit notice of charges and can see the file supporting the charges.[136] Tenured employees also receive a hearing at which the government bears the burden of proof.[137] In contrast, dismissed probationary employees asserting substantive constitutional violations or arbitrary and capricious government action receive nothing but the employing agency's "conclusions" [138] and bear the burden of proof themselves.[139] This burden has been described in numerous decisions as a heavy one; the former employee must show that his dismissal was motivated by constitutionally impermissible reasons,[140] or that it was "lacking in rational support." [141] The conclusory statements customarily cited in support of probationary dismissals unquestionably furnish excellent cover for arbitrary government conduct,[142] and make it all the more dif-

131. *See, e.g.*, Holden v. Finch, 446 F.2d 1311, 1316-17 (D.C. Cir. 1971); Peale v. United States, 325 F. Supp. 193, 196 (N.D. Ill. 1971). *Cf.* Christian v. New York State Dep't of Labor, 414 U.S. 614, 618 n.4 (1974).

132. *See, e.g.*, Ring v. Schlesinger, 502 F.2d 479, 488-90 (D.C. Cir. 1974); Horne v. United States, 419 F.2d 416 (Ct. Cl. 1969) (hearing held before a commissioner of the Court of Claims).

133. *See* Board of Regents v. Roth, 408 U.S. 564, 574, 579 (1972); Perry v. Sindermann, 408 U.S. 593, 598, 603 (1972).

134. *See, e.g.*, Cohen v. United States, 384 F.2d 1001, 1004 (Ct. Cl. 1967); Bennett v. United States, 356 F.2d 525, 529-30 (Ct. Cl. 1966); Heaphy v. United States Treasury Dep't, Bureau of Customs, 354 F. Supp. 396, 402 (S.D.N.Y. 1973), *aff'd*, 489 F.2d 735 (2d Cir. 1974).

135. Sampson v. Murray, 415 U.S. 61, 91-92 (1974).

136. 5 C.F.R. § 752.202(a) (1975).

137. *See, e.g.*, Simmonds v. Government Employees Serv. Comm'n, 375 F. Supp. 934, 940-41 (D.V.I. 1974); Buggs v. City of Minneapolis, 358 F. Supp. 1340, 1344 (D. Minn. 1973).

138. 5 C.F.R. § 315.804 (1975).

139. *See, e.g.*, Ring v. Schlesinger, 502 F.2d 479, 490 (D.C. Cir. 1974); Horne v. United States, 419 F.2d 416, 419 (Ct. Cl. 1969).

140. Board of Regents v. Roth, 408 U.S. 564, 574 (1972).

141. Horne v. United States, 419 F.2d 416, 419 (Ct. Cl. 1969).

142. *See, e.g.*, Christian v. New York Sate Dep't of Labor, 347 F. Supp. 1158, 1166 (S.D.N.Y. 1972) (Frankel, J., dissenting), *rev'd*, 414 U.S. 614 (1974):

> We ought not to be so "practical" that we fashion legal judgments upon the premise that federal officials commonly fire people upon grounds so tenuous that they would not dare order the firings if they thought someone,

ficult for a dismissed employee to carry the burden of proving his assertions. Given these impediments, dismissed probationary employees are seldom able to prevail.[143]

An equally serious problem is delay, well illustrated by the case of *Holden v. Finch*.[144] The plaintiff, Anna Holden, was dismissed from the Office of Education in HEW on January 7, 1966.[145] In appeals to the Civil Service Commission, she claimed that her dismissal was in retaliation for her exercise of protected first amendment rights of free speech and association. These appeals were decided adversely on May 6 and August 31, 1966 on jurisdictional grounds.[146] Suit was thereafter initiated and the district court granted summary judgment for the government without opinion on August 1, 1969.[147] A decision in the Court of Appeals in Miss Holden's favor was issued on May 17, 1971, remanding the matter to the Civil Service Commission.[148] A hearing was held by the Commission in June and July 1972, and the appeals were again denied administratively on February 7 and May 21, 1973,[149] the Commission still refusing to come to grips with the merits of the first amendment claim.[150] Suit was reinstituted

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somewhere else, without authority to reverse the firings might so much as air the asserted grounds.

Id. at 1166 n.7.

143. In none of the published decisions has a federal probationary employee yet prevailed in finally overturning his dismissal on grounds of substantive constitutional violations or arbitrary and capricious action. These decisions do not, of course, reflect the subsequent administrative disposition when the right to an agency or Civil Service Commission hearing has been granted.

144. 446 F.2d 1311 (D.C. Cir. 1971).

145. *Id.* at 1313.

146. *Id.* at 1314.

147. Brief for Appellant at 2, Holden v. Finch, 446 F.2d 1311 (D.C. Cir. 1971).

148. Holden v. Finch, 446 F.2d 1311 (D.C. Cir. 1971).

149. Memorandum in Support of Plaintiff's Motion for Summary Judgment at 4, Holden v. Weinberger, Civil No. 1955-73 (D.D.C., filed Oct. 23, 1973).

150. *See id.* at 4-5. The regulations of the Civil Service Commission do not contain any guidance for hearing appeals of this nature from dismissed probationary employees. 5 C.F.R. § 315.806(b)(1)(1975), states with respect to appeals based on discrimination because of race, color, religion, sex, national origin, or age that "[t]he Commission refers the issue of discrimination to the agency for investigation of that issue and a report thereon to the Commission." There is no provision for a hearing. Appeals based on "partisan political reasons or marital status or . . . improper discrimination because of physical handicap" are stated to be appealable to the Commission, but there is no provision for either an agency "investigation" or a hearing. *Id.* § 315.806(b)(2).

A parallel system for investigation, hearing and review of "complaints of discrimination" based on "race, color, religion, sex, or national origin" is set forth in *id.* §§ 713.211-.236. A complaint may be submitted to an agency by "any aggrieved employee or applicant for employment." *Id.* § 713.212(a). An investigation must be conducted by the agency, and a hearing must be granted if the complaint is not informally resolved. *Id.* §§ 713.216, .217(b). An appeal lies to the Commission from the agency decision. *Id.* § 713.231(a).

in the district court on October 23, 1973, and there the matter still rested as of September 1975.[151] During this period of almost ten years, the dismissed employee was denied any remedy of back pay or reinstatement and any clearing of her name from the stigma of dismissal. The *Holden* example may be extreme, but it is unlikely that dismissed probationary employees at the state or federal level fare distinctly better as a class.

IV. Judicial Enforcement of a "Full and Fair Trial" for Federal Probationary Employees

Federal probationary employees have consistently been granted judicial review of the procedures surrounding their dismissals to determine whether the applicable regulations were followed.[152] But the steps required for termination itself are few[153] and afford no meaningful protection. Other regulations, however, prescribe the form and content of the entire probationary year in considerably more detail, and are logically as closely related to the decision to terminate in a particular case as is the regulation requiring written notice and a statement of conclusions at the time of dismissal itself.

Regulations of the Civil Service Commission provide that "[t]he agency shall utilize the probationary period as fully as possible to determine the fitness of the employee. . . ."[154] The Federal Personnel Manual is also promulgated by the Civil Service Commission and, although not published in the Code of Federal Regulations, prescribes additional detailed procedures in the personnel field for all federal agencies. The Manual states that supervisors should observe the probationary employee's conduct, general character traits and performance closely; give proper guidance; and study the employee's potentialities carefully to determine suitability for successful government work.[155] The Manual goes on to state a requirement for a full and fair trial of each individual's capabilities:

> A person selected for appointment through competitive examination is presumed to possess the skills and character traits necessary for satisfactory performance as a career employee. That presumption, however, must be verified through demonstrated capacity during the probationary period. If the appointee fails to demonstrate these characteristics after full and fair trial, his separation for disqualification is proper. This action may be based upon deficiency in duty performance, lack of aptitude or cooper-

151. Holden v. Weinberger, Civil No. 1955-73 (D.D.C., filed Oct. 23, 1973).

152. *See, e.g.*, Toohey v. Nitze, 429 F.2d 1332, 1334 (9th Cir. 1970), *cert. denied*, 400 U.S. 1022 (1971); Medoff v. Freeman, 362 F.2d 472, 474-75 (1st Cir. 1966); Greenway v. United States, 163 Ct. Cl. 72, 77-80 (1963).

153. 5 C.F.R. § 315.804 (1975) requires written notice including "as a minimum . . . the agency's conclusions as to the inadequacies of . . . performance or conduct."

154. *Id.* § 315.803.

155. Federal Personnel Manual, ch. 315, subch. 8, ¶¶ 8-3.a(1)-(3) (as amended April 25, 1975).

ativeness, or undesirable suitability characteristics evidenced by his activities either during or outside official working hours.[156]

In addition, the Manual directs that a written evaluation of the probationary employee be submitted "through supervisory channels" between the beginning of the ninth month and the end of the tenth of the probationary period.[157] This requires the employee's supervisor to bring his thoughts, conclusions and recommendations into focus in meaningful written fashion. In short, the regulations and the Manual together provide a moderately structured framework that, if adhered to, would inject an element of fairness into the probationary scheme for the employees subjected to it.

The rules and regulations of the Civil Service Commission are binding on federal agencies.[158] Federal courts have frequently suggested that similar effect should be given to the Federal Personnel Manual[159] and have referred to it as prescribing the detailed administrative procedures applicable to federal employment generally.[160] They have, in addition, held that derivative rules of the employing agencies, rules which are not necessarily published in the Code of Federal Regulations, should nonetheless be given binding effect.[161]

Federal probationary employees, therefore, should be able to rely on the provisions of the Federal Personnel Manual and to secure judicial enforcement of the Manual's requirement that they be afforded a full and fair evaluation. This argument has been used in a number of cases since 1950 and has met with varying degrees of success. In *Levy v. United States*,[162] the Court of Claims ordered a full evidentiary hearing on a probationary employee's claim that he had been denied a full and fair trial, stating that the employee had a right to a complete and even-handed test of his job capabilities "as a condition precedent to the termination of plaintiff's service."[163]

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156. *Id.* ¶ 8-4.a(1). The phrase "full and fair trial" is repeated in paragraphs 8-3.a(4) and 8-4.a(2).

157. *Id.* ¶ 8-3.a(5).

158. 5 U.S.C. § 1302 (1970). Dargo v. United States, 176 Ct. Cl. 1193, 1203 (1966).

159. Shelton v. EEOC, 357 F. Supp. 3, 8 (W.D. Wash. 1973), *aff'd*, 416 U.S. 976 (1974); Harris v. Nixon, 325 F. Supp. 28, 35 (D. Colo. 1971).

160. Arnett v. Kennedy, 416 U.S. 134, 160 n.24 (1974); Shelton v. EEOC, 357 F. Supp. 3, 8 (W.D. Wash. 1973), *aff'd*, 416 U.S. 976 (1974); Marcus v. United States, 473 F.2d 896, 898 (Ct. Cl. 1972); Cohen v. United States, 384 F.2d 1001, 1004 (Ct. Cl. 1968).

161. Ring v. Schlesinger, 502 F.2d 479, 483 (D.C. Cir. 1974); Young v. United States, 498 F.2d 1211, 1219-20 (5th Cir. 1974); Bennett v. United States, 356 F.2d 525, 527 (Ct. Cl.), *vacated*, 385 U.S. 4 (1966); Greenway v. United States, 163 Ct. Cl. 72, 81-82 (1963); Watson v. United States, 162 F. Supp. 755, 758-59 (Ct. Cl. 1958).

162. 118 Ct. Cl. 106 (1950).

163. *Id.* at 112.

The *Levy* decision was followed in *Greenway v. United States* [164] and *Dargo v. United States* [165] and appears to represent the consistent view of the Court of Claims. In two decisions in 1970 and 1971, however, the Court of Appeals for the District of Columbia declined to give decisive weight to the full and fair trial provisions of internal agency regulations and the Federal Personnel Manual. In *Donovan v. United States*,[166] the court held that a dismissed probationary employee had no cause of action where the FAA had ignored the requirements for counseling and training contained in its own *Employee Performance Improvement Handbook*.[167] In *Holden v. Finch* [168] the same court declined to hold that HEW was bound by both its internal "personnel instructions and standards for supervision and training" and by the Federal Personnel Manual requirement for a formal evaluation during the probationary period.[169] Most recently, in *Young v. United States*,[170] however, the Fifth Circuit took a more generous view in considering the dismissal of a nontenured employee of the Army-Air Force Exchange Service. The plaintiff in *Young* was not covered by provisions of the Lloyd-La Follette Act,[171] and hence he was in some degree analogous to a probationary employee in the competitive service. However, the court looked to the internal Army-Air Force regulation prescribing grounds and procedures for dismissal from the Exchange Service as determinative of the dismissed employee's rights and held that he was entitled to judicial review with respect to these provisions.[172]

Notwithstanding the line of decisions in the Court of Claims and the somewhat parallel situation presented in *Young*, federal courts have shown reluctance to become enmeshed in the full and fair trial issue.[173] No compelling basis has been articulated for this reluctance, however, and it seems unjustified, given the paucity of procedural safeguards otherwise available to probationary employees. More scrupulous enforcement of the full and fair trial requirement would be consistent with the purpose of probationary employment as expressed in the regulations [174] and decisions.[175] Conversely,

164. 163 Ct. Cl. 72, 81-83 (1963).

165. 176 Ct. Cl. 1193, 1203-05 (1966).

166. 433 F.2d 522 (D.C. Cir. 1970), *cert. denied*, 401 U.S. 944, *reh. denied*, 402 U.S. 1005 (1971).

167. 433 F.2d at 523-24.

168. 446 F.2d 1311 (D.C. Cir. 1971).

169. *Id.* at 1312 n.1.

170. 498 F.2d 1211 (5th Cir. 1974).

171. *Id.* at 1216-17.

172. *Id.* at 1222-23.

173. *Cf.* Sayah v. United States, 355 F. Supp. 1008, 1011 (C.D. Cal. 1973), where the court noted in passing that the employee had received "inadequate and haphazard supervision"; Harris v. Nixon, 325 F. Supp. 28, 35 (D. Colo. 1971), where the court held that a one-day delay in filing the formal written evaluation constituted substantial compliance with the *Federal Personnel Manual* requirement.

174. 5 C.F.R. § 315.803 (1975) states that the purpose of probation is "to determine the fitness of the employee . . . ."

nonenforcement renders those portions of the Federal Personnel Manual essentially meaningless and stands as an open invitation to arbitrary conduct by government employers.

V. Conclusion—Toward a More Just Probationary System

As matters stand, probationary employees largely are excluded from the safeguards of procedural due process. Protection against retaliatory action for exercise of substantive constitutional rights exists in theory; protection against arbitrary and capricious action exists in some courts, though not in others. But even where theoretically available, these protections may serve more to soothe consciences than to provide effective remedies. Similarly, enforcement of the concept of full and fair trial on the job is spotty at best. Thus, probationary employees comprise an enclave of civil servants that is singled out for maximum exposure to the risk of arbitrary government conduct.

The federal probationary employment system has existed for close to a century in virtually unchanged form, and many of the states have imitated it. It is important to take a new look at these systems today, in light of our growing awareness that loss of *any* government employment can be a shattering, perhaps irremediable, disaster for the individual:

> Removal from government employment for cause carries a stigma that is probably impossible to outlive. Agency personnel officers are generally prepared to concede, as employee spokesmen claim, that it is difficult for the fired government worker to find employment in the private sector. The impression that it is difficult to fire government employees is widely shared—perhaps itself a product of the procedures that must be observed—and contributes to the belief that anyone who gets fired by the government is probably unemployable.[176]

The mere threat of dismissal, express or implied, looms heavily over every civil servant's first year of service. If the traumatic impact of dis-

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175. In Sayah v. United States, 355 F. Supp. 1008, 1016, (C.D. Cal. 1973), the court referred to probation as a period of "watchful waiting." In Cohen v. United States, 384 F.2d 1001, 1003-04 (Ct. Cl. 1968), the Court of Claims stated: "The probationary period was designed to deal with performance and conduct deficiencies. Those employees who cannot properly shoulder the normal burdens of their position in this one-year period are ordinarily to be separated rather summarily."

176. 2 R. Merrill, Report of the Administrative Conference of the United States, Procedures for Adverse Action Against Federal Employees 1007, 1015 (1972). The Report deals with tenured employees, but it is unlikely that either potential employers or the dismissed employees themselves draw any fine distinctions between dismissal for "cause" and dismissal during probation. *See also* Arnett v. Kennedy, 416 U.S. 134, 220 (1974) (Marshall, Douglas & Brennan, JJ., dissenting); Berenguer v. Dunlavey, 352 F. Supp. 444, 453 (D. Del. 1972), *vacated*, 414 U.S. 895 (1973). In connection with probationary dismissals specifically, *see* Sampson v. Murray, 415 U.S. 61, 95-97, 101-03 (1974) (Douglas, Marshall & Brennan, JJ., dissenting).

missal itself has been correctly assessed, then we must consider not only the probationary employees who have been dismissed, but also those who are still on the job, since "surely the threat of being fired is equal to the threat of most minor and some not so minor criminal sanctions."[177] As a nation we benefit in the long run from leavening the civil service with men and women who are imaginative, innovative and at times perhaps controversial. But the probationary system places in the hands of the first-line supervisory bureaucracy a potent weapon for stifling the very qualities we prize.

We must assume, as experience has shown us, that some measurable percentage of the government officers who make decisions on probationary employees will act in an arbitrary and unprincipled fashion, that they will place their personal concerns or the petty interests of their own branch or office ahead of the interest of the public service as a whole. Yet in the state and federal probationary systems these officers are almost completely free to curb, perhaps permanently, the innovation and imagination that many new employees bring to their jobs. The protection that exists today against such arbitrary and even unconstitutional conduct is almost wholly inadequate.[178] In sum, we pay a high price for the probationary system.

As a matter of policy we should not tolerate a system that is neither the product of reasoned and thorough deliberation by the legislature nor amply justified by practical necessity. But, when we look to the history of the federal statute enacting probationary employment, we see that virtually no consideration was given to the pros and cons of "probation" as contrasted with "tenure." Instead, probation was created in answer to critics of competitive appointment by written examination, at a time when summary dismissals from government employment generally were the rule and not the exception. Nor is there any persuasive evidence that subsequent legislatures, which first created and later gradually extended job security provisions for tenured employees, undertook any reasoned reassessment of the probationary system.[179]

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177. Herzbrun v. Milwaukee County, 338 F. Supp. 736, 738 (E.D. Wis. 1972), *rev'd*, 504 F.2d 1189 (7th Cir. 1974). *See also* Arnett v. Kennedy, 416 U.S. 134, 203-05 (1974) (Douglas, Marshall & Brennan, JJ., dissenting).

178. Only the Court of Claims consistently reviews probationary dismissals on the "arbitrary and capricious" standard and grants a full evidentiary hearing when the allegations warrant. *See, e.g.*, Greenway v. United States, 163 Ct. Cl. 72, 81-83 (1963).

179. Dealing with probationary employment in Sampson v. Murray, 415 U.S. 61 (1974), the most that the Court could say was that probation defines "a class which Congress has specifically recognized as entitled to less comprehensive procedures" and that "Congress expected probationary employees to have fewer procedural rights than permanent employees in the competitive service." *Id.* at 80-81, citing the Veterans' Preference Act, 5 U.S.C. §§ 7511, 7512 (1970), and a statute prescribing suspension for national security reasons, 5 U.S.C. § 7532. The problem is that the statute creating probation does not define what it means and does not explain what it entails. *Id.* § 3321.

In terms of utility, the probationary system unquestionably saves a quantity of paperwork and a number of hearings each year. But this surely cannot be the end of the inquiry. Hearings and administrative paperwork have costs that can be measured. If these costs do not compellingly outweigh the harm that arbitrary dismissals inflict on the public service, then the case for a probationary system seems shaky. It is beyond the scope of this article to measure and compare these costs. It is enough that the case for the probationary system as presently established has not yet convincingly been made.[180]

The probationary system in state and federal government runs directly counter to the strong policy against arbitrary government conduct permeating our legal system:

> Man being what he is cannot safely be trusted with complete immunity from outward responsibility in depriving others of their rights . . . . That a conclusion satisfies one's private conscience does not attest its reliability. The validity and moral authority of a conclusion largely depend on the mode by which it was reached. Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness.[181]

The best and possibly the only effective antidote to arbitrary government conduct is the strong impetus in our law favoring the right to be heard on contested issues of fact. However, in confronting the future of the probationary system we are not faced with a choice of full "adverse action" proceedings or nothing. Our goal is to reduce the possibility of arbitrary conduct to an acceptable minimum and at the same time preserve the broad discretion of government employers to select and retain the best people for the job.

A number of possibilities are open. At the very least, a probationary employee should be given the specific reasons for his nonretention and an opportunity to respond in some fashion.[182] In addition, an evidentiary hearing of some kind at the administrative level is essential to meaningful protection against arbitrary conduct. The hearing could be limited, how-

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180. *See* MERRILL, *supra* note 176, at 1023.

181. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 171-72 (1950) (Frankfurter, J., concurring).

182. *See* Goss v. Lopez, 419 U.S. 565, 577-81 (1975); Geneva Towers Tenants' Org. v. Federated Mtg.. Investors, 504 F.2d 483, 491-92 (9th Cir. 1974); Shelton v. EEOC, 357 F. Supp. 3, 7 (W.D. Wash. 1973), *aff'd*, 416 U.S. 976 (1974). In *Shelton*, the court quoted approvingly from K. DAVIS, ADMINISTRATIVE LAW TEXT § 4.07, at 106 (3d ed. 1972):

> Often a trial-type hearing is too cumbersome or too expensive or both, and yet some procedural protection is desirable. *Often a good procedure is to let a party know the nature of the evidence against him and to listen to what he has to say.*

357 F. Supp. at 7. (emphasis in original.) This right is not available today even to probationary employees who assert substantive constitutional violations or arbitrary and capricious actions.

ever, to deciding whether the dismissal infringes substantive constitutional rights, is arbitrary or is the product of less than a full and fair trial. It may be reasonable to place on the employee the burden of establishing that the facts cited in support of his dismissal are incorrect, that the dismissal was motivated by impermissible grounds, or that the probationary term was procedurally defective. So limited, the administrative hearing process should be workable and not excessively burdensome [183] on either the federal or state level. Whether imposed as a requirement of procedural due process or by enlightened legislative and administrative action, the extension of even these minimal rights would go a long way toward solving the dilemma of probationary government employees and curbing arbitrary dismissals.

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183. The procedure followed in the Court of Claims and in some of the other federal courts in probationary employee cases furnishes an example. *E.g.*, Greenway v. United States, 175 Ct. Cl. 350 (1966), where after remand and an evidentiary hearing the court sustained a probationary dismissal as not arbitrary and capricious. Evidentiary hearings, however, should be conducted by an administrative agency such as the Civil Service Commission and not by the courts. *See, e.g.*, Holden v. Finch, 446 F.2d 1311, 1316 (D.C. Cir. 1971). Not only do the courts lack much of the necessary background and expertise, but they are expensive and often beyond the reach of the middle-income wage earners who are the most likely victims of arbitrary probationary dismissals.